

OPINIONS

OF THE

CORPORATION COUNSEL
and ASSISTANTS

JANUARY 1, 1954 to DECEMBER 31, 1960

Compiled and Edited under the Supervision of

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CITY OF CHICAGO
DEPARTMENT OF LAW

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PREFACE

With the publication of this volume, number 24 of a series, the opinions of the Corporation Counsel and Assistants of the City of Chicago beginning with the year 1871 is extended through 1960.

The seven years (1954 through 1960) of legal guidance and expression encompassed within this volume were years marked by the initiation and realization of bold and vigorous plans and projects for all of the people of the City of Chicago. The enormity of growth in the field of municipal activity gives a vastness and complexity to the field of municipal law which was unknown a few years ago. The increase in municipal duties, services, responsibilities and activities is due in a large part to the vast economic, social and scientific change of the current era and to the tremendous growth in area, population and the importance of urban renewal areas and their attendant problem. Municipal law is probably the most expansive general legal topic in the sphere of jurisprudence today.

To be the Corporation Counsel of the City of Chicago is an honor of singular significance in the legal profession and the challenge which it presents in representing the legal interests of three and one-half million people is indeed exciting and gratifying. This honor and this challenge has been heightened by the privilege of serving as such in an era of tremendous activity in both my city and my legal specialty. For this honor I am truly indebted and deeply grateful to Mayor Richard J. Daley.

The resources and talent of the Department of Law are available to all City officials and the diversity encompassed herein attests to the extensive use made thereof. The opinions themselves are legal guideposts, carefully researched, analyzed and set out in these volumes to aid those officials in the day to day operation of their respective governmental functions.

To my Administrative Assistant, Richard L. Curry, who compiled, edited and indexed this volume, a task consuming months of his time in addition to his regular duties; to the Assistants whose work product is reflected herein; and to the entire staff of the Department of Law whose energies and devotion I have been the beneficiary of, I extend my sincere appreciation.

JOHN C. MELANIPHY,
Corporation Counsel.

December 31, 1960.

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EXPLANATORY NOTES

The opinions in this volume are *not* all of the opinions rendered by the Department of Law during the seven years this volume covers. To do so would make this work unduly repetitious in many areas and would increase its bulk without any significant increase in its value as a reference for City officials. All opinions and correspondence of the Department of Law for the subject years have been reviewed by the Editor and the opinions set out herein represent the most significant and most thorough work of this office on the specific subject. However, we hasten to advise City officials that an expression of legal opinion rendered by this office during the years 1954 through 1960 is still a binding opinion for their guidance regardless of the fact that it may not have been included for preservation in this volume.

DATA GIVEN WITH REPORTED OPINIONS

Above each opinion reported in this volume there is printed in italics the number of the opinion, the office or officer to whom the opinion was written, the initials of the person who prepared the opinion and the date of the opinion.

When the office or officer to whom the opinion was written is indicated by the letters "PP" the opinion was addressed to a person who was not a municipal official, having public business with the city.

NUMBERING OF OPINIONS

The numbering of opinions is a continuation of the chronological sequence of Volume XXIII of the *Opinions of the Corporation Counsel and Assistants*; the arrangement of the opinions is according to their subject matter.

Opinions numbered 11779 and 11780 were rendered by this office prior to 1954 but were never included in previous opinion volumes. Because of their value they have been included at this late date.

For reference convenience, a table of the opinion numbers with corresponding page numbers is given in this volume at page 737.

SECTION I

**MUNICIPAL ORGANIZATION AND
INTERGOVERNMENTAL RELATIONS**

CHAPTER I—POWERS AND DUTIES OF CITY COUNCIL AND CITY OFFICERS

A. CITY COUNCIL

REGULATION OF CHARITABLE SOLICITATION

(No. 11781—Alderman, 19th Ward—A. F. G.—January 4, 1954.)

Recently you sent to this office considerable material in reference to the regulation of the solicitation of funds for charitable purposes. The material includes a copy of the annual report for 1952 of the Social Service Commission of Los Angeles, California; copies of the ordinance of that city regulating the solicitation of funds for charitable purposes, various forms including Notices of intention to Solicit, report blanks, Information cards and application and bond for paid charity promoters and solicitors.

You request that we study this matter and advise you if, under the laws of this State, the city has power by ordinance to license, register or otherwise regulate solicitation for charitable purposes.

A municipality can legislate only on those subjects which the legislature has expressly authorized it to act. We find no provision in the statutes granting to municipalities the power to license, register or regulate the solicitation of funds for charitable purposes.

The question of the authority of the city to enact such legislation has been presented to this office more than once. In an opinion dated November 23, 1916 to the commissioner of public welfare with respect to the power of that body to supervise unchartered philanthropic organizations and agencies, we said:

"We are of the opinion that your department has not, and that the city council cannot clothe it with, authority at the present time to exercise compulsory supervision over these organizations and agencies; and there is considerable doubt as to how far, if at all, the Legislature, if it were disposed so to do, could under the constitution, authorize the city council to clothe your department with such authority." (Opinions of the Corporation Counsel, Vol. 10, page 152.)

In another opinion dated December 1, 1931, written by Mr. Hornstein, First Assistant Corporation Counsel, on the same subject we said:

"With reference to request contained in your letter of October 14, 1931, to which you attached a copy of an ordinance introduced by Alderman Hodes relating to solicitation of funds and other contributions for charitable or philanthropic purposes we beg to advise you that such ordinance could not at present be enacted with any chance of its being sustained as to validity.

The writer has already explained to you that the city lacks authority under its delegated powers to legislate on the subject in question. Such legislation has been adopted in the city of New York and in the city of Los Angeles, but in both cases the state has given specific authority for that purpose.

Having in mind that before any such legislation can be adopted in the city of Chicago an enabling Act must be secured, we have drafted a bill which may serve the purpose that can be presented when the proper time comes to the general assembly of the state." (Opinions C. C. Volume 18, p. 86.)

Following this opinion, a bill, Senate Bill No. 406 was introduced in the Fifty-Eighth General Assembly (1933) which would have authorized cities to regulate the solicitation of funds for charitable purposes or purposes denominated as charitable, and to issue permits for such purposes. This bill passed the Senate but failed of passage in the House.

We do not find that any similar legislation has ever been enacted by the General Assembly since that time.

In the case of Los Angeles to which much of material submitted by you refers, that city has been invested by its charter with broad powers of investigation and endorsement of charitable agencies, prevention of misstatement and fraud in the solicitation of funds for charitable uses; encouragement of the establishment of needed charities; and disbursement of city funds set apart for charitable and philanthropic purposes. If Chicago's charter, (the Revised Cities and Villages Act) granted similar powers to the city, we could probably deal with this problem as effectively as Los Angeles does.

Our "Tag Day" ordinance, which in effect is a limitation on the solicitation of funds for charitable purposes on public ways, is authorized by the express grant of power "to regulate the use of the streets."

In view of the prior opinions of this office, we are of the opinion that until enabling legislation is enacted the city is without power to enact the proposed legislation.

REGULATE ROOMING HOUSES

(No. 11794—Commissioner of Buildings—A. F. G.—March 3, 1954.)

In your letter of February 23, 1952 you ask to be advised as to:

"1. Does the City Council have the legal right to enact ordinances to control the establishment, operation, maintenance of rooming houses in the City of Chicago by means of a license?

If your opinion states that the City Council does not have this authority then:

2. Would it be legal for the City Council to take the enclosed proposed licensing ordinance, and use the term 'registration' throughout instead of 'license', and enact legislation that would be valid at this time?"

The proposed ordinance referred to above was not enclosed with your letter, but we can answer your question without such draft.

A municipality can only exercise such powers as are expressly delegated to it by the Legislature and such as are necessarily implied from those expressly given. No power to license rooming houses or hotels is expressly granted to municipalities by the Cities and Villages Act. In 1907 the City of Chicago enacted an ordinance licensing and regulating hotels. A hotel keeper who was not licensed under this ordinance was convicted. On appeal our Supreme Court in *City of Chicago v. M. & M. Hotel Company*, 248 Ill. 264 (1911) held the conviction void and the ordinance invalid for want of power in the City to enact it. This answers your first question.

Recognizing this lack of power the City of Chicago at the last session of the General Assembly attempted to have passed a bill which would authorize the City to license and regulate hotels and rooming houses. The bill, Senate Bill 554, failed of passage.

By the proposal in your second question of using the term "registration" instead of "license" you are attempting to do indirectly what you have no power to do directly. Webster defines "license" as: "Authority or liberty given to do or forbear any act; permission to do something (specified); especially a formal permission from the proper authorities to perform certain acts or to carry on a certain business which without permission would be illegal; also, the document embodying such permission;"

A "registration" certificate is in effect the same as a license or a permit and if legal would authorize the holder to carry on the business covered by it.

In an opinion by this office on this matter we said: "While the ordinance in question does not call this registration fee a license fee, nevertheless, it stands on the same footing as a license fee, and would probably be so construed in case it would be passed on by a court". (Opinions of the Corporation Counsel Vol. XVII, p. 427.)

We would suggest that you do not present the proposed ordinance in its original form or as proposed in your second question as we do not believe we could defend its validity in either case.

REFERENDUM ON FLUORIDATION

(No. 11813—Chairman, Committee on Health—A. F. G.—May 13, 1954.)

In your letter of May 10, 1954 you ask:

"Will you kindly favor me with an opinion with reference to the power of the City Council to submit to referendum the question of whether or not water supplied to residents of Chicago be treated by fluoridation?"

The power of the City Council to provide for the fluoridation of the City's water supply for the proration of health and the prevention of disease is found in Article 23 of the "Revised Cities and Villages Act". That article consists of Sections 23-1 to 23-112, both inclusive, and is an enumeration of many of the powers of the city council.

Section 23-1 reads as follows:

"23-1—Grant of powers.) The corporate authorities of a municipality shall have the powers enumerated in sections 23-2 to 23-112 inclusive." Section 23-81 reads:

"23-81—Promote health.) To do all acts and make all regulations, which may be necessary or expedient for the promotion of health or suppression of diseases."

We find no provision in the statutes requiring the city council to submit ordinances enacted under the foregoing provision to a referendum of the people before the same become effective.

There are provisions granting power to the city council to enact certain ordinances and requiring the submission of such ordinances to a vote of the

people before they go into effect. Section 23-6 of the Cities and Villages Act authorizes the city council to issue bonds for the corporate purposes of the municipality, but Section 17-1 of the same Act provides that no bonds of the municipality shall be issued until the question of authorizing such bonds has been submitted to the electors of the municipality at an election and approved by a majority voting upon the question.

Likewise the power to impose a one-half cent sales tax provided in Section 23-111 is subject to the requirement that the ordinance imposing the tax shall be submitted at a designated election and approved by a majority voting on the question. Generally in Illinois, municipal corporations are not required to submit ordinances enacted under an express grant of power, to a vote of the people, unless the grant of power provided for such submission. In 1920 this office was requested to prepare an ordinance providing for the submission to the voters at a coming primary election of an ordinance for daylight saving time, in subsequent years. With respect to this request we said: "We beg to call your attention to the fact that the statutes authorize the city council to submit to the voters for approval only certain classes of ordinances, such as traction ordinances, bond ordinances and ordinances for the sanctioning of additional appropriations to be made after the time for the council to make appropriations has passed. By a familiar rule of construction, the enumeration of these ordinances as properly subject to a referendum excludes the submission of others that the statutes do not expressly authorize or require to be submitted." (Opinions C. C. Vol. II p. 59.)

This view is sustained by McQuillen in his work on Municipal Corporations, Vol. 2, 2nd Edition, Section 727, where he said:

"A municipality cannot submit an ordinance to a vote of the electors without legal authorization."

On this question the Supreme Court of New York in *Mills v. Sweeney*, 219 N. Y. 213 (1916) said:

"I think that the charter provisions prescribing when a referendum may be had are exclusive, and by implication prohibit the common council from providing by ordinance for a referendum as to other matters."

Levering v. Board of Supervisors of Electors of Baltimore City, 129 Maryland 335 (1916) upholds this principle.

Authority to enact ordinances for the promotion of health and the suppression of diseases has been vested by the General Assembly in the city council of municipalities and is a legislative matter which the city council has no power to delegate to others. To provide in a public health ordinance, that it shall not be in effect until submitted to and approved by the voters is in effect delegating to the voters legislative power which by statute belongs exclusively to the city council. *People ex rel. Dreyer Co. v. City of Chicago*, 413 Ill. 515 (1952).

It is our opinion, therefore, that the city council has no power to submit to referendum the question of whether or not water supplied to residents of Chicago be treated by fluoridation. However, any question of public policy may be submitted to the electors of a municipality, upon the filing of a petition signed by 25% of the registered voters of the municipality as provided in Article 28 of the Election Code. No authority is given the city council as a body to initiate such a petition nor would the result of such referendum be legally binding on the city council.

FLUORIDATION AS A QUESTION OF PUBLIC POLICY

(No. 11836—Alderman, 36th Ward—J. C. M.—July 26, 1954.)

In your letter dated July 19, 1954 you transmitted a printed form of a petition for the submission of the proposition of prohibiting the use of sodium fluoride, or any other fluorides, in the water supply of the City of Chicago and requested an opinion "as to whether fluoridation comes within the meaning of said Article 28 of the Election Code as being a question of public policy which can be submitted to the people of Chicago in a referendum pursuant to said Article 28."

Article 28, Par. 28-1, Illinois Revised Statutes 1953, after providing for the minimum number of signatures of registered voters required upon a written petition, provides:—"It shall be the duty of the proper election officers in each case to submit *any question of public policy so petitioned for*, to the electors of the * * * city, etc."

The term "public policy" is uncertain and undefined. The Statutes are silent as to any definition. The term "public policy" has been defined as being that principle of law which declares that no one may lawfully do that which has a tendency to be injurious to the public welfare. The public policy of a state is to be found embodied in its constitution and its statutes. When these are silent upon the subject, then in the decisions of its courts. (*People v. Wiersma State Bank*, 361 Ill. 75.) Public policy of a state, when not fixed by the constitution, is not unalterable but varies upon any given question with changing legislation thereon. The word "question", as defined in Bouvier's Law Dictionary, is "something in controversy, or which may be the subject of a controversy."

At present there is no controversy over the use of fluorides in the water supply of the City of Chicago as the City Council has gone on record as favoring such use.

The principal case that has considered this paragraph of the Statute is *City of Litchfield v. Hart* (1940), 306 Ill. App. 621. It does not decide what the term "public policy" means but it does decide that any such expression of opinion by the electors is purely advisory. On page 624 the court said:

"The title to the act which said election was held under is as follows: "'An act providing for an expression of opinion by electors on questions of public policy at any general or special election.'" From the language used in the title, it appears that the act provides for the expression of opinion thereon by electors, and allows them an opportunity to express their sentiment on certain questions. This is as far as the act goes. It does not state what the effect of the election shall be nor is there any provision in this statute where an adverse vote against any question of public policy would nullify all statutes or ordinances in conflict with said vote. The legislature meant just what it stated in the title of the act, that is for the people of a political subdivision to express an opinion upon the question of public policy, the result of which is not binding upon the authorities, but merely advisory. The result of an election under a public policy act, is not mandatory upon the government officials of a political subdivision, but only directory.

"The public policy act is not analogous to the initiative and referendum. Initiative means the power of the people to propose bills and laws, and to enact or reject them at the polls, independent of legislative assembly. Referendum is the right of the people to have submitted for their approval or rejection, an act passed by the legislature.

"The legislature, having seen fit to give cities and villages the right to legislate and pass upon certain ordinances, have also impliedly given them the right to repeal and amend these ordinances. The only way an ordinance of a city can be repealed or amended is by an ordinance duly passed by the city council of said city. *Hibbard v. City of Chicago*, 173 Ill. 91."

In an opinion dated May 13, 1954 addressed to Honorable William H. Harvey, Chairman, Committee on Health, we said, in part:

"Authority to enact ordinances for the promotion of health and the suppression of diseases has been vested by the General Assembly in the City Council of municipalities and is a legislative matter which the City Council has no power to delegate to others. * * * It is our opinion, therefore, that the City Council has no power to submit to referendum the question of whether or not water supplied to residents of Chicago be treated by fluoridation."

People ex rel. Dryer Co. v. City of Chicago (1952), 413 Ill. 315, 323, involved the statute delegating to the property owners abutting a given street the power to change the name of the street. In holding the statute to be unconstitutional the court said (p. 323):

"The legislature cannot abdicate its functions or subject citizens and their interests to any but lawful public agencies, and a delegation of any sovereign power of government to private citizens cannot be sustained nor their assumption of it justified. (Citing cases.) The delegation contained in Section 23-26 clearly vests in a group of citizens the arbitrary discretion of what the law shall be. Such delegation of authority is not warranted by Section 1 of Article IV of our constitution or by the principles of constitutional construction which have been placed upon it."

It follows that Article 28, Par. 28-1 to be constitutional must be advisory only, otherwise there would be an unlawful delegation of legislative authority.

It would appear from the use of the words "duty" and "any question of public policy so petitioned for" in the Statute, the legislature intended to give the electorate the free use of expression of opinion in line with the provisions of Article II, Section 17, which guarantees to the people the "right to make known their opinions to their representatives."

If the necessary number of petitions are presented to the Election Commissioners, it will become their duty to determine whether the question being submitted is a "question of public policy." The question is not free from doubt. In the House of Representatives of the United States Government, all petitions, except such as are of an obscene or insulting character, are entered on the Journal. (Constitution of the United States of America, Revised and Annotated 1952, p. 806.) Since the expression of opinion that might follow the submission of the proposition to the electorate would be advisory only, all doubts as to whether the question presented is a question of public policy within the purview of the statute should be resolved in favor of the petitioners.

The determination of the question rests, if the occasion presents itself, with the Election Commissioners.

We are not attempting to answer the question for that Body but are submitting for your consideration and guidance the foregoing expressions. The City Council having already spoken on the subject, the matter is no longer controversial and even if the majority of the electorate, being given the opportunity to speak thereon, vote in favor of the proposition, action by the City Council would be necessary before there can be any change in the legislative policy concerning the use of fluorides in the City water supply.

REPOSSESSION OF AUTOMOBILES

(No. 11849—Alderman, 28th Ward—A. F. G.—September 16, 1954.)

Your letter of September 13, 1954 is as follows:

"I am writing with respect to the possibility of licensing automobile recovery bureaus, i.e. those credit companies, etc. which recover financed automobiles on which the payments have been defaulted. I would appreciate it if you will kindly look into this matter and give me an opinion as to the legality of such proposal."

A municipality has no inherent power to license an occupation or tax the privilege of engaging in it, but such power must be expressly granted in its charter, or be necessarily incident to powers so granted. We do not find in the "Revised Cities and Villages Act" that any power has been expressly or impliedly granted to municipalities to license, tax, or regulate companies or bureaus, engaged in the business of recovering financed automobiles on which payments have been defaulted. In the absence of such power it is our opinion that an ordinance licensing such occupation would not be sustained.

CITY COUNCIL RULE No. 45

(No. 11854—Alderman, 28th Ward—A. F. G.—September 21, 1954.)

In your letter of September 10, 1954 you call attention to a resolution passed by the city council at its meeting of July 28, 1954, C. J. p. 8073, amending Rule 45 of the City Council's Rules of Order. The resolution reads as follows:

"*Resolved*, that Rule 45 of the City Council's Rules of Order be amended by inserting the following language at the end of the first paragraph:

'Provided, however, that no ordinance included in any of the following classifications shall be passed by the City Council except after previous committee consideration, viz.:

- a. Ordinances for amendment of the Municipal Code of Chicago.
- b. New general ordinances.
- c. Ordinances for amendment of general ordinances.'

You then say:

"I would like an opinion from your office as to the scope of this Rule—specifically, as to what ordinances are encompassed in the Municipal Code of Chicago and what is the definition of a general ordinance. I feel as though an opinion is necessary in order that the City Council act within the Rule, inasmuch as there are so many different types of ordinances introduced at each meeting."

We are at a loss to understand what the intention of the Council was in adopting this proviso. The first paragraph of Rule 45 provides: "Ex-

cept as provided in Rule 40, all ordinances (except an ordinance fixing the time for the next succeeding regular meeting of the City Council) * * * shall, unless by unanimous consent, be referred (without debate except by consent of the Council) to appropriate committees, and only acted upon by the Council at a subsequent meeting, on the report of the committee having the same in charge."

If under Rule 45 prior to amendment all ordinances were required to be referred to committee, what reason is there, as provided by the amendment, for requiring so called general ordinances to be so referred. The term "general ordinance" has no well defined meaning. The term is not mentioned in the "Revised Cities and Villages Act" which is the City's charter. Article 10 of that Act deals with ordinances, and provides in Section 10-1 the form of the ordaining clause of ordinances. Section 10-3 provides: "All ordinances of cities and villages imposing any fine, penalty, imprisonment or forfeiture, or making any appropriation, shall within one month after they are passed, (1) be printed in book or pamphlet form, published by authority of the corporate authorities, or (2) be published at least once in a newspaper published in the city or village, or if no newspaper is published therein, copies thereof shall be posted in three public places in the city or village. No such ordinance shall take effect until it is so published or posted * * *. All other ordinances, resolutions, and motions shall take effect upon their passage unless they otherwise provide."

If this article contained provisions with respect to the passage, publication, etc. of general ordinances as distinguished from other ordinances there might be some reason why the council in its rules should differentiate between general ordinances and other ordinances. But that has not been done.

Answering the last paragraph of your letter the Municipal Code of Chicago consists of Chapters 1 to 194, each inclusive, of that Code. Neither the charter nor the Code of Chicago defines the term "general ordinance" and the term seems to have no definite meaning. McQuillin in his work on Municipal Corporations discusses general and special ordinances as follows:

"As regards their operation, ordinances are spoken of as general and special. All ordinances of a general nature having an obligatory force on the community and upon the administration of the Municipal government may be denominated general. Those granting franchises and special privileges to persons or corporations, providing for public work and improvement, as establishing sewer districts, ordering the construction of sewers, streets and sidewalks, fixing the grade of streets, authorizing the city to borrow money, empowering officials to do certain things as the leasing of property, the laying of water pipes, etc. are usually special." (McQuillin 2nd Ed. Sec. 671.)

Under Rule 52, any rule of the Council may be temporarily suspended by the affirmative vote of 34 aldermen.

SKYWAY ORDINANCE APPROVAL

(No. 11873—Chairman, Committee on Traffic & Public Safety—
J. C. M.—December 9, 1954.)

We have examined the proposed ordinance to authorize construction of a toll bridge over the Calumet River and the approaches thereto and to authorize the issuance of Calumet Skyway Toll Bridge Revenue Bonds to pay the costs thereof (Committee Pamphlet No. 46, November 4, 1954), together

with the proposed amendments as set forth in the Council Journal Proceedings of November 29, 1954 (C. J. pp. 8679-8681).

There are blank spaces as to the date of the adoption of the ordinance contained in Sections 1.01 (c) and 2.04 which spaces should be filled in upon the passage of the ordinance, and also the blank space for interest rate appearing in Section 2.04 in the form of the bonds, which space cannot be filled in at this time but which will be provided for by supplemental ordinance when the authority to sell the bonds is provided for by the City Council.

We have not examined the plans and specifications mentioned in Section 2.01, as being on file in the office of the City Clerk. However, we have been advised by the Commissioner of Public Works that the plans and specifications and the estimated cost of the construction of said bridge referred to therein meet with his approval.

We call attention to the fact that under Chapter 24, paragraph 27a-3, Ill. Rev. Stats. 1953, it is provided:

"No ordinance pursuant to this section shall become effective until after the plans and specifications relating to the project have been submitted to and approved by the department." (Meaning the Department of Public Works and Buildings of the State of Illinois.)

Reference is made to this statutory authority in Sections 1.03 and 2.02 of the ordinance.

Under Section 2.01 of the ordinance it will be necessary for the Chief of Engineers and the Secretary of the Army to determine and approve the minimum clearance of the bridge over the Calumet River and any plans and specifications providing for such minimum clearance other than as approved by said Chief of Engineers and the Secretary of the Army will be modified accordingly.

Prior to the authorization of the sale of any bonds under this ordinance, there should be some memorandum or agreement in writing with the Indiana Toll Road Commission providing for the connection with the Calumet Skyway Toll Bridge approach at a point on the Illinois-Indiana state line.

With the foregoing matters in mind, we are of the opinion that the ordinance complies with the statutory provisions.

CRIME COMMITTEE

(No. 11901—City Council—J. C. M.—May 6, 1955.)

At the meeting of the City Council held on April 21, 1955, a request was made for a written opinion as to the status of the Emergency Committee on Crime which committee was created by ordinance of the City Council passed on February 14, 1952 (C. J. p. 1932). An appropriation for this committee was made by the City Council in the Annual Appropriation Ordinance of the City of Chicago for the Year 1955, passed December 10, 1954 (C. J. pp. 8815-9019).

The ordinance creating the committee was held to be valid by the Supreme Court of Illinois in the case entitled *Du Bois, et al. v. Gibbons, et al.*, in an opinion appearing in Volume 2 Ill. (2) 392 of the Supreme Court Reports.

On April 21, 1955, the Committee on Committees and Rules submitted to the City Council resolutions for the adoption of Rules of Order and for the appointment of membership of the standing committees of the City Council. No mention is made therein to the Emergency Committee on Crime.

It is our opinion that the Emergency Committee on Crime has the authority to continue to function until such time as the ordinance creating it is repealed by ordinance (*Hibbard & Co. v. City of Chicago*, 173 Ill. 91, 97), or until it presents to the City Council its final report (Section 32 Roberts' Rules of Order Revised).

In the *Hibbard & Co.* case the Supreme Court said:

"A mere resolution or order by the City Council, not passed and published as an ordinance of the City, would not constitute a repeal of an ordinance duly passed."

The fact that there are vacancies in the membership of the committee due to recent elections in no manner affects the legal status of the committee any more than it would be affected if such vacancies occurred by reason of other factors, such as a resignation or a death of a member. There are enough members remaining on the committee to constitute a quorum (City Council Rule 43).

DUTIES OF THE COMMITTEE ON LICENSES

(No. 11906—Chairman, Council Committee on Licenses—J. C. M.—
May 17, 1955.)

Answering your letter of May 16, 1955, in which you request an opinion as to the scope of your duties and the functions, authority and jurisdiction of the Committee on License, we refer to the source of such power being Chapter 24, Article 23 (Cities and Villages) of the Illinois Revised Statutes (1953). We have selected therefrom the various sections that refer to licensing and regulating, or simply regulating, as follows:

"Section 23-5. To fix the amount, terms and manner of issuing and revoking licenses.

"Section 23-22. To license street advertising by means of billboard, sign boards, and signs; and to regulate the character and control the location of billboards, sign boards, and signs upon vacant property and upon buildings.

"Section 23-45. To license, regulate and prohibit water craft used about the harbor, or within the jurisdiction.

"Section 23-51. To license, tax and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, and all others pursuing like occupations, and to prescribe their compensation.

"Section 23-52. To license, tax, regulate and prohibit runners for cabs, buses, railroads, ships, hotels, public houses, and other similar businesses.

"Section 23-53. To license, tax and regulate all vehicles conveying loads within the municipality. The net revenue from these vehicle licenses, after deducting the actual cost of collection and disbursement thereof, shall be used for improving, paving, repairing and maintaining the streets and other public roadways of the municipality. But in municipalities of more than 3,000 inhabitants not more than 35% of the annual gross revenue from these vehicle licenses may be used for payment of salaries and wages of policemen engaged in regulation of traffic, and in municipalities of 40,000 or more inhabitants the net revenue from these vehicle licenses may be used also for the construction, maintenance, and operation of testing stations for the inspection of motor vehicles. As amended by act approved Aug. 3, 1951. L. 1951, p. 2016.

"Section 23-54. To license, tax, regulate, or prohibit hawkers, peddlers, pawnbrokers, itinerant merchants, transient vendors of merchandise, theatricals and other exhibitions, shows and amusements; to license, tax, and regulate all places for eating or amusement.

"Section 23-55. To license, tax and regulate all athletic contests and exhibitions carried on for gain.

"Section 23-56. To license, tax, regulate, or prohibit pin, ball, or bowling alleys, billiard, bagatelle, pigeon-hole, pool, or any other tables or implements kept for a similar purpose in any place of public resort.

"Section 23-72. To prevent the dangerous construction and condition of chimneys, fireplaces, hearths, stoves, furnaces, pipes, ovens, boilers, and any other fire or heating apparatus used in and about any building; and, if they are in a dangerous condition, to cause them to be removed or placed in a safe condition; to cause all buildings and enclosures which are in a dangerous fire condition to be put in a safe fire condition; to regulate and prevent the carrying on of factories that are dangerous in causing or promoting fires; and to prevent the deposit of ashes in places that create a fire hazard.

"Section 23-75. To regulate and prevent the storage of turpentine, tar, pitch, resin, hemp, cotton, gunpowder, nitroglycerine, petroleum, or any of their products, and other similar combustible or explosive material.

"To regulate and prevent the use of lights and combustible liquids in buildings, and the building of bonfires.

"To regulate and prevent the use of firecrackers, torpedoes, and all sorts of fireworks.

"Section 23-77. To provide for the inspection of steam boilers and elevators.

"To provide for the examination, licensing, and regulation of persons having charge of steam boilers under steam pressure, exhausting through an engine, and of persons having charge as starters or operators of all freight and passenger elevators run by hydraulic, electric, steam, water balance, compressed air, or any other motive power.

"To fix the amount of the license fee, terms, and manner of issuing to and revoking the licenses of the specified persons.

"To provide for the appointment by the mayor or the president of the board of trustees of competent boards of examiners, which shall examine applicants and license those found capable and trustworthy to operate steam boilers or elevators, as the case may be.

"Section 23-81. To do all acts and make all regulations, which may be necessary or expedient for the promotion of health or the suppression of disease.

"Section 23-83. To erect, establish, and maintain non-profit hospitals and medical dispensaries. To locate and regulate hospitals, medical dispensaries, sanatoria, and undertaking establishments.

"Section 23-84. To establish and regulate cemeteries within or without the municipal limits; to acquire lands therefor, by purchase or otherwise; to cause cemeteries to be removed; and to prohibit their establishment within one mile of the municipal limits.

"Section 23-85. To regulate and prohibit the running at large of horses, asses, mules, cattle, swine, sheep, goats, geese, and dogs, and to impose a tax on dogs.

"Section 23-87. To locate and regulate the use and construction of breweries, distilleries, livery, boarding, or sale stables, blacksmith shops, foundries, machine shops, garages, parking lots, camps accommodating persons in house trailers, house cars, cabins or tents, laundries, and bathing beaches. As amended by act approved July 6, 1953. L. 1953, p. S. B. No. 375.

"Section 23-88. To locate and regulate the use and construction of packing houses, factories for the making of tallow candles, fertilizers, or soap, and tanneries within the municipality, and within the distance of one mile beyond the municipal limits.

"Section 23-91. To license, tax and regulate auctioneers, private detectives, money changers, bankers, brokers, barbers, and the keepers or owners of lumber yards, lumber storehouses, livery stables, public scales, ice cream parlors, coffee houses, florists, detective agencies and barber shops.

"Section 23-92. To regulate and prohibit the keeping of any lumber or coal yard, or the placing, piling, or selling of any lumber, timber, wood, coal, or other combustible material within the fire limits of the municipality.

"Section 23-94. To license, tax, locate and regulate all places of business of dealers in junk, rags, and any second-hand article whatsoever.

"Section 23-105. To pass and enforce all necessary police ordinances."

And, in Chapter 24, Section 21-17 it is provided:

"The city council may also regulate the use of space over streets, alleys and public places of the city, and upon payment of proper compensation, to be fixed by ordinance, may permit the use of the space more than twelve feet above the level thereof."

The above enumerated grants give the City express power to either license and regulate or to regulate only. The power to regulate has been held to include the power to license (*City of Chicago v. R. & X. Restaurant*, 369 Ill. 69). Hence by these grants of express police power the City has authority to license and regulate any occupation and any particular subject set forth in the above quoted provisions of the act, for the purpose of protecting the public health and the public safety.

There are some other powers to license and regulate which the municipal corporation has by virtue of the very nature of the objects to be accomplished. For instance, in *Father Basil's Lodge, Inc. v. The City of Chicago*, et al., 393 Ill. 246 at 247 the Supreme Court held that cities have implied power to license where express power is given to regulate to prevent fire and

to promote health, and that while a city is given no express power to regulate and license the establishment of homes for the aged and nursing homes, ordinances which are enacted for the purpose of promoting the health and safety of inmates thereof by guarding them from exposure to disease, impairment of health and dangers of fire, and requiring the operators of such homes to be licensed, are valid police regulations within the power of the city to enact and enforce.

In determining whether the City has the power that is not specifically spelled out in the statute, we must consider all the facts relating to the subject matter and the purpose that the City Council has in mind in connection with a proposed ordinance for licensing or regulating and determine if it is applied only to a certain class of a field where the classification is reasonable.

There is a matter that was pending before the License Committee in 1954 relative to a proposed amendment of Chapter 113 of the Municipal Code of Chicago relating to license fees of insurance brokers and real estate brokers. The Circuit Court of Cook County held that Section 113-24 of the Municipal Code of Chicago was invalid when taken into consideration with the provisions of Section 113-28, so that presently we do not have a valid ordinance providing for license fees for insurance brokers. We respectfully refer to our letters sent to the Committee dated December 17, 1953, January 25, 1954 and April 29, 1954 and the proposed amendments to the City Code.

Because of the words "for gain or profit" in Section 104-2 and Section 104.1-2 of the Municipal Code of Chicago, we have been experiencing considerable difficulty with a number of corporations not organized for profit that put on amusement or sporting events. In order to eliminate the ambiguity that is presented by those words, the City Collector suggests that Sections 104-2 and 104.1-2 be amended. He has suggested a form of amendment which we consider will carry out the purpose intended. We transmit the same herewith.

We are also experiencing some difficulty with the provisions of Section 193-26 of the Municipal Code of Chicago relating to bagatelle or pigeon-hole machines. Recently a Judge of the Circuit Court has been ruling that to be a bagatelle or pigeon-hole machine, all of the elements that are mentioned in the section must be present. We have had the Appeals Division prepare a proposed amendment which we transmit to you for your consideration. We recognize that it is not for the Law Department to determine policies, but feel that you should be advised as to the experiences we have had with the courts in connection with the interpretation of the ordinance.

ALDERMANIC ELECTION CONTEST

(No. 11907—Chairman, Committee on Committees and Rules—A. F. G.
—May 18, 1955.)

Pursuant to an order passed by the city council May 12, 1955 directing the Corporation Counsel to submit an opinion as to the jurisdiction of the city council in the matter of hearing petitions for contests of elections for the office of alderman, we submit the following:

Section 9-40 of the Revised Cities and Villages Act, provides in part as follows:

"Section 9-40. Council judge of election of its members.) The city council shall be the sole judge of the election to office of the aldermen. * * *

Article 21 of the Revised Cities and Villages Act, is the so-called "Little Charter of the City of Chicago." This Article was adopted pursuant to an amendment to Article IV of the Constitution (Section 34 Article IV). That section provides that; "No law based upon this amendment to the Constitution affecting the municipal government of the city of Chicago shall take effect until such law shall be consented to by a majority of the legal voters of said city voting on the question at any election, general, municipal or special, * * *." Article 21 was adopted by the legal voters of the City of Chicago at the election of November 4, 1947.

Section 21-1 of Article 21 reads as follows:

"Section 21-1. Powers and Obligations under this Article.) The city of Chicago upon the adoption of this article in the manner stated in sections 21-2 to 21-4 inclusive, in addition to all of the rights, powers, privileges, duties and obligations conferred thereon elsewhere in this or any other Acts, shall have the rights, powers and privileges, and shall be subject to the duties and obligations conferred in this article. The provisions in other articles of this Act shall be in full force and shall continue to apply to the city of Chicago insofar as they are not inconsistent with the provisions of this article, but the provisions of this article shall supersede all inconsistent provisions in the other articles of this Act."

"Section 21-27. Election Contest-Petition.) Any candidate whose name appears on the ballots used in any ward of the city at any election for alderman, may contest the election of the candidate who appears to be elected from said ward on the face of the returns, or may contest the right of the candidates who appear to have received the highest and second highest number of votes to places on the official ballot at any supplementary election, by filing within five days after such election with the Clerk of the County Court of Cook County, a complaint in writing, verified by the candidate making the contest, setting forth the grounds of the contest. The contestant in each contest shall also serve notice on all persons who were candidates for alderman of such ward at the said election, within such five days, informing them that such complaint has been or will be filed. The judge of the County Court of Cook County shall have jurisdiction to hear and determine such contest. All proceedings in relation to such contest after the filing of such complaint shall be the same, as near as may be, as provided for in the case of a contest at a primary election in said city. In case the said county judge shall decide that the complaint is insufficient in law, or that the candidate who appears to have been elected on the face of the return has been duly elected, the complaint shall be dismissed. If it shall appear to the satisfaction of said county judge that the face of the returns are not correct, and that the candidate who appears thereby to have been elected was not in fact elected, then the candidates having the highest and second highest number of votes as determined by such contest shall be candidates at the subsequent supplementary election as provided for in section 21-26."

Section 9-40 of the Cities and Villages Act, which makes the city council sole judge of the election of aldermen is inconsistent with and in conflict with section 21-27 cited above, which gives to the Judge of the County Court of Cook County jurisdiction to hear and determine election contests for the office of alderman in the city of Chicago.

It is provided in section 21-1 quoted above that the provisions of Article 21 shall supersede all inconsistent provisions in the other articles of the Cities and Villages Act.

It is our opinion, therefore, that the City Council of the City of Chicago is without power to hear and determine petitions for contests of election, that power being expressly conferred on the County Judge of Cook County by section 21-27 referred to above.

PENALTY FOR ILLEGAL CONVERSIONS

(No. 11944—Alderman, 40th Ward—S. R. D.—August 29, 1955.)

We acknowledge receipt of your letter of August 12, 1955, in which you state that as an effective means of combatting illegal conversions, you are considering introducing an ordinance

“which would permit a lessee who has occupied the premises which have been illegally converted to sue his lessor for the amount of all rent he has paid his lessor within a period of two years preceding the date of filing the action.”

You request our opinion as to the legality of such an ordinance. It is a well established principle that municipal corporations have no inherent power but must always be able to point to a particular statutory provision giving them authority to legislate on a particular subject. *Arnold v. City of Chicago* (1944), 387 Ill. 532, 537; *Ambassador East, Inc. v. City of Chicago* (1948), 399 Ill. 359, 365; *Baltis v. Village of Westchester* (1954), 3 Ill. 2d 388, 397.

An examination of the powers granted to municipalities (Ill. Rev. Stats. 1953, Ch. 24, Section 23) does not disclose the power to enact the ordinance you have under consideration. In addition, it should be noted that a municipality has only the power to provide for a fine not exceeding \$200 and a penalty not exceeding six months for one offense (Ill. Rev. Stats. Ch. 24, Par. 23-106).

We are, therefore, of the opinion that the proposed ordinance would be unconstitutional.

SHORT WAVE RADIOS

(No. 11945—Alderman, 39th Ward—A. F. G.—August 31, 1955.)

We have your letter of August 15, 1955, in which you state that you would like to cooperate with a police captain in your district who suggests that it might be possible to prepare an ordinance by which the possession or control of a short wave length radio by a convicted felon would be a violation of law. You request our opinion of the validity of such an ordinance.

Municipalities have no power except those delegated by the State. We find no power granted to the City of Chicago to regulate or impose restrictions on the use of radio sets. The City of Chicago operates a radio broadcasting station for the transmission of police messages to police cars equipped with short wave length receiving sets. It does this by virtue of a license issued by the Federal Communications Commission, which body has sole jurisdiction under Section 302 Federal Communications Act 47 U. S. C. A. That section provides in part:

“No person is permitted to use or operate a radio broadcasting station, except pursuant to a license granted under the provisions of the Federal Communications Act. * * *”

In 1931 the General Assembly of Illinois enacted a law entitled, “An Act in relation to the establishment and operation of radio broadcasting stations and the acquisition and installation of radio receiving sets for police

purposes." (Approved July 7, 1931.) Section 4 of the said Act, paragraph 780k, Chap. 38, Ill. Rev. Stats. 1947 reads as follows:

"No person, except peace officers in this State, shall equip any automobile with a short wave length radio receiving set or use the same in such automobile without first obtaining permission to do so from the sheriff of the county, from which such automobile is registered as shown by the records of the Secretary of State or in the case of a non-resident from the Department of Public Safety. Before granting such permission, the sheriff or the department shall require a sworn written statement, that such radio receiving set will not be used to assist in the escape of any criminal or for any other unlawful purpose from the person to whom he grants such permission."

The Act is still in force, but Section 4 quoted above was repealed in 1949, Laws 1949 p. 721. The repeal of this section indicates the public policy of the State to be, not to restrict the use of short wave length radio sets in automobiles.

In view of this changed policy of the State and in the absence of an express grant of power to municipalities to regulate such use, we are of the opinion that the proposed ordinance would be invalid.

COUNCIL'S EXECUTIVE BUDGET POWERS

(No. 11971—Chairman, Finance Committee—J. C. M.—October 20, 1955.)

In answer to your verbal request of October 11, 1955 as to the powers and authority of the City Council over the budget appropriation ordinance for 1956 under the law as amended by the 69th General Assembly, please be advised:

(1) The Mayor, prior to November 1, 1955, shall submit to the City Council the executive budget for the ensuing fiscal year as prepared by the budget director and approved by the Mayor. The executive budget, as the same may be revised or altered by the City Council, shall provide the basis upon which the annual appropriation ordinance is prepared and enacted.

(2) *The City Council shall make the budget document as submitted by the Mayor conveniently available to public inspection for at least ten (10) days prior to the passage of the annual appropriation ordinance, by publication in the journal of proceedings or in such other form as the corporate authorities may prescribe.*

(3) *Not less than one (1) week after the publication of the budget document, and prior to final action on the appropriation ordinance, the corporate authorities shall hold at least one public hearing on the budget document. Notice of this hearing shall be given by publication in a newspaper having general circulation in the municipality at least one week prior to the time of the hearing.*

(4) *Subsequent to the public hearing and before final action is taken on the appropriation ordinance, the corporate authorities may revise, alter, increase or decrease the items contained in the budget document.*

(5) *Upon completion of its action on the budget document, the corporate authorities shall enact the same as so revised as the annual appropriation ordinance. All the requirements pertaining to the form and substance of the budget document, including limitations, as prescribed by Sec-*

tion 22-1 of the Revised Cities and Villages Act, shall be applicable to the appropriation ordinance.

Detailed schedules supporting the appropriation ordinance shall be attached thereto and shall be published in the official record of the City of Chicago simultaneously with the appropriation ordinance, but shall not be considered as an official part of such ordinance.

The aggregate amount finally appropriated by the appropriation ordinance, including any subsequent amendments thereof, from any fund or for any purpose, including amounts appropriated for judgments and all other unpaid liabilities and all other purposes for which the corporate authorities are by said section or otherwise by law required to appropriate, shall not exceed the aggregate amount available in that fund or for that purpose, as shown by the estimates of available assets thereof at the beginning of the fiscal year for which appropriations are made and of taxes and other current revenue set forth in the budget document as submitted to the corporate authorities as so revised by the budget director pursuant to Section 9-68.

NOTE: Under Section 9-68 *the budget director* may submit to the corporate authorities a *revised report on all matters* specified in Section 9-67 (his estimate of money necessary to defray the expenses of the current fiscal year), at any time prior to the passage of the annual appropriation ordinance, upon the basis of the information then available, and he may submit amendments of this revised report at any time prior to the passage of the annual appropriation ordinance.

If the appropriations from any fund as set forth in the appropriation ordinance as finally adopted exceed in the aggregate the maximum amount which the corporate authorities are authorized by this section to appropriate therefrom, all appropriations made from that fund by the appropriation ordinance shall be void. In this latter event the several amounts appropriated for current operation and maintenance expense in the appropriation ordinance of the last preceding fiscal year shall be deemed to be appropriated for the fiscal year for which the void appropriations were made for the objects and purposes, respectively, as specified in the last preceding appropriation ordinance. The several amounts so deemed to be appropriated shall institute lawful appropriation upon which taxes for the fiscal year for which the void appropriations were made may be levied pursuant to the provisions of Section 16-1.

(6) The corporate authorities may amend the annual appropriation ordinance at their next regular meeting occurring not less than five (5) days after the passage thereof, in like manner as other ordinances. The ordinance as originally passed or as subsequently amended, also may be amended at any regular or special meeting held *not more* than fifteen (15) days after the first regular meeting of the corporate authorities occurring not less than five (5) days after the passage of the ordinance, by repealing or reducing the amount of any item of appropriation contained therein.

ANNEXATION PROCEDURES

(No. 11972—Director, Chicago Plan Commission—B. M. K.—October 21, 1955.)

Pursuant to your verbal request the various procedures by which the City of Chicago may annex contiguous territories follow:

Unincorporated territories may be annexed through court action initiated by a petition signed by a majority of the owners of record and also a majority of the electors in such territories requesting that the County

Court submit the question of annexation to the corporate authorities of the annexing municipality. After a court hearing the court may direct that the annexation be considered by the corporate authorities of the annexing municipality. The corporate authorities may annex this area by a $\frac{2}{3}$ vote and this action is final unless, (1) a petition for referendum is filed or, (2) referendum is ordered by the corporate authorities. The petition for referendum must be signed by electors equal to 10% of the number of electors voting for all candidates for Mayor at the last election and must be submitted within 30 days of council action. If this petition is filed then the question of annexation is submitted to the people at an election and a majority vote is determinative.

A different procedure for annexing unincorporated territories may be initiated by a municipal ordinance expressing a desire to annex adjacent areas and requesting that the County Court submit this proposition to the electors of the adjacent area. After a hearing the court may direct that a special election be held in the unincorporated area and an affirmative majority is required to annex.

Unincorporated territories contiguous to a municipality in which no electors reside may be annexed by a municipal ordinance passed by a $\frac{2}{3}$ vote upon the petition of all the owners of the land within such territory. Unincorporated territories in which electors reside may be annexed in the same manner upon petition of all the electors residing within such territories. If the City is the owner of territory contiguous to the City it may be annexed by ordinance without the necessity of a $\frac{2}{3}$ vote.

An entire municipality may be annexed by a $\frac{2}{3}$ vote of each City Council followed by an election in each municipality in which an affirmative majority is required in both municipalities. This procedure may also be initiated by petition for an election to the County Judge rather than by a $\frac{2}{3}$ vote of each Council.

A part of a municipality may be annexed, if that part is less than 160 acres, upon the petition of $\frac{1}{2}$ the electors and $\frac{1}{2}$ the property owners of that part. The city authorities by a $\frac{2}{3}$ vote may consent to a disconnection of that part; the annexing City may then annex by a $\frac{2}{3}$ vote of the City Council.

A part of a municipality more than $\frac{1}{2}$ square mile in area may be annexed upon petition signed by 100 or more electors of the area concerned to the County Court requesting elections in both cities. An affirmative majority is required in both cities and in the area concerned in order to effect annexation.

PUBLICATION OF APPROPRIATION ORDINANCE

(No. 11983—Chairman, Committee on Finance—J. F. G.—November 30, 1955.)

In reply to your inquiry as to whether the Annual Appropriation Ordinance including the Budget Document must be published in a newspaper to make the ordinance effective, you are advised that the only provision relating to publication of ordinances is contained in Section 10-3 of the Cities and Villages Act which provides in part that ordinances making any appropriation shall (1) be printed in book or pamphlet form, published by authority of the corporate authorities or (2) be published at least once, within 10 days after passage, in one or more newspaper published in the municipality.

Section 5-5 of the Municipal Code of Chicago requires the City Clerk to keep a journal of the proceedings of the city council in printed form and that copies of the journal of each meeting be printed and published in pamphlet form carrying an inscription or legend showing that they are published by authority of the city council. Said section concludes as follows:

"All ordinances passed by the city council which are required by statute to be published in pamphlet form before taking effect shall be printed in full text in such published pamphlet copies of the journal of the proceedings of the city council for the respective council meetings."

Section 5-5 of the Municipal Code of Chicago was adopted to comply with the provisions of Section 10-3 of the Cities and Villages Act relating to publication of ordinances and in our opinion newspaper publication of the Annual Appropriation Ordinance is not necessary if the full text of the ordinance with the budget document annexed is printed in the council journal.

INCREASE ALDERMEN'S SALARIES

(No. 12024—Alderman, 7th Ward—A. F. G.—March 16, 1956.)

In your letter of March 13, 1956 you ask our opinion if the proposition which will appear on the ballots at the April 10th election, providing for an increase in the pay of aldermen will be applicable to salaries of present aldermen, if approved by the voters.

Section 4-2 of the Municipal Code of Chicago is as follows:

"Each alderman shall receive, as compensation for his services as such, the sum of five thousand dollars per annum. No other salary or compensation shall be allowed any alderman except as hereinafter provided.

The annual salary of the chairman of the committee on finance of the city council, as and for his compensation for services rendered as chairman of said committee, is hereby fixed at such sum as will, when added to the compensation of said chairman as alderman, amount to eight thousand five hundred dollars."

This section was enacted pursuant to authority granted by sections 21-7, 21-22 and 21-23 of the "Revised Cities and Villages Act". Section 21-7 (Compensation of officers) contains this provision: "The city council by ordinance, other than the appropriation ordinance, shall fix the compensation of each officer who is elected or appointed for a definite term fixed by statute and his salary shall not be increased or diminished during his term of office." Section 21-22 of the said Act fixes the term of aldermen of the city of Chicago at four years. Section 21-23 of the said Act provides that aldermen elected under the provisions of Article 21 "may receive for that service such compensation as shall be fixed by ordinance, at the rate of not to exceed five thousand dollars per annum for each alderman". At the 67th General Assembly held in 1953, the legislature amended section 21-23 to permit an increase in aldermanic salaries to "eight thousand" dollars per annum.

Article 21 of the "Revised Cities and Villages Act", which is known as "Little Charter of the City of Chicago" was adopted pursuant to an amendment to Article IV of the Constitution (Section 34 Article IV). This section provides that:

"No law based on this amendment to the constitution affecting the municipal government of the city of Chicago shall take effect until such law shall be consented to by a majority of the legal voters of said city voting on the question at any election, general, municipal or special * * *."

It is because of this provision in the constitutional amendment, that the amendment of 1953 to section 21-23 is being submitted to the voters at the April election. Unless it is approved by the voters at that election it shall have no effect, but may again be submitted to the voters. If it is approved, the city council may by ordinance other than the appropriation ordinance fix the salaries of aldermen at not to exceed eight thousand dollars per annum.

Each of the present aldermen was elected in the Spring of 1955 for a term of four years and under the provision of section 21-7 of the Little Charter shall not have his compensation increased during his term of office.

If the voters approve the amendment to section 21-23, and the city council by ordinance fixes the compensation of aldermen at eight thousand dollars per annum, none of the present aldermen would be entitled to the increased compensation during his present term of office, but if re-elected in 1959 would be so entitled.

AUTHORITY TO RESTRICT AIRPORT TRAFFIC

(No. 12093—City Council Committee on Aviation—J. C. M.—December 13, 1956.)

On November 27, 1956 you requested an opinion as to whether the City of Chicago has the authority to determine the maximum capacity per day on plane movements at Chicago Midway Airport, O'Hare Field-Chicago International Airport and Merrill C. Meigs Field and to put a limitation on such movements per day and during peak periods of the day. In short you request an opinion as to whether the City has the authority to restrict the volume of traffic at the airports.

Under Chapter 24, Section 22-7 of the Illinois Revised Statutes (1955) relating to municipalities with a population of 500,000 or more and their powers to acquire and operate airports, such municipalities are given the power:

"(1) to operate any public airport, buildings, structures or facilities relating thereto and to charge and collect rents, rates or other compensation for any use thereof or for any service rendered by the municipality in the operation thereof, provided that, subject to the capacity thereof, the landing field, landing strips and landing float shall be available to any person, without unjust or unreasonable discrimination as to services and charges, for landing and take-off by any aircraft; * * *."

The same general powers are contained in Chapter 24, Section 23-96.

In *People v. Wood*, 391 Ill. 237, 244, the Supreme Court said:

"There is in principle no essential difference, so far as the public interest and the public safety are concerned, between the operation of a public airport and that of a highway, subway, wharf, public park and the like. Such airports have been characterized as the 'highways of the air.' * * *. The unanimous holding has been that such purposes (the operation of an airport) is public and governmental in nature."

The airports in the City of Chicago are owned and operated by the City.

Congress provided that the Civil Aeronautics Board should prescribe minimum standards to promote safety in air commerce. The Board and the Administrator adopted air traffic rules, controlling the operation of aircraft throughout the nation, including the establishment of civil airways, likened to a system of highways for surface traffic. The Board has prescribed rules as to the minimum altitude of aeroplanes in flight. In *Allegheny Airlines, Inc.*

v. *Village of Cedarhurst, et al.*, 132 F. Supp. 871, the court held that a city ordinance limiting the minimum altitude of planes in flight over the City to 1,000 feet was held to be invalid because the Federal Government had exercised its governmental powers in determining, by rules, the minimum safety flight altitudes. The court there recognizes that the States have the power to legislate in fields outside those preempted by Congress. The Board has not legislated, by rules, upon the capacity of an airport to absorb traffic.

We have been unable to find any decisions bearing on the right of the State or municipality thereof to exercise its police power in determining the capacity of an airport to safely absorb air traffic. We are of the opinion that the State and municipalities thereof have such powers and can exercise them in a proper case. This power cannot be arbitrarily exercised. There must be a reasonable basis for imposition of traffic restrictions. In the case of *Seltenreich, et al. v. Town of Fairbanks*, 211 F. (2) 83 (certiorari denied by U. S. Supreme Court, 348 U. S. 887) the court held that the Town of Fairbanks could close down an airport when a better airport was available. There the court said:

"Under the conditions described its continued use for the landing and taking off of planes posed an obvious hazard to life and limb which the council was not warranted in ignoring. The prohibition and penalizing of such operation was an appropriate exercise of the police power of the municipality. Moreover, it must be remembered that the land was the property of the Town, not of appellants (users). The council, acting under authority of law and in the exercise of its considered judgment had determined that the use of the property as an airport was no longer in the public interest, and had closed it to aviation."

In *Tatum v. City of Hallandale*, 71 So. (2) 495, the Supreme Court of Florida recognizes that municipalities may exercise their police powers in aviation matters not inconsistent with the Federal regulations.

In the exercise of the police power, the city council prior to placing any restrictions on the operations of the airport, should determine from facts the necessity and extent of any regulations bearing upon the safety factors involved.

It is our opinion, therefore, that it is within the powers of the City to determine the maximum capacity of plane movements per day at each of its three airports and if the facts justify, it may further determine a limitation of use during any particular period of the day.

This opinion is not intended to discuss the right of the Civil Aeronautics Board and the procedure before it attendant to the designation as through which particular airports the air carriers shall conduct their operations and the extent thereof.

(*City of Dallas v. Civil Aeronautics Board*, 221 F. (2) 501.)

REDISTRICTING OF WARDS

(No. 12148—Chairman, Committee on Committees and Rules—A. F. G.
—August 6, 1957.)

Your letter of July 23, 1957 is as follows:

"The Committee on Committees and Rules is at present engaged in compiling figures for the purpose of redistricting the wards of Chicago. In this connection, I would appreciate an opinion from you as to whether, under the redistricting ordinance, we will be obliged to use the 1950 federal census figures.

From figures which we have obtained from various sources, it is estimated that the population of Chicago has increased by about 200,000 since the 1950 census. On the basis of this information, any redistricting based on the 1950 figures would not be accurate."

The power, authority and duty of the city council of Chicago with respect to dividing the city into fifty wards and for the periodical redistricting of the wards so divided are set out in detail in sections 21-36 to 21-43 inclusive of the "Revised Cities and Villages Act". Article 21 of the said Act of which these sections are a part is known as the "Little Charter" of the city of Chicago. Article 21 was enacted in 1941, but was not approved by the voters of Chicago until November 2, 1947. Until this approval, Article 12 of the Cities and Villages Act of 1872, which was identical with Article 21 was in effect. The present wards were divided under Article 12.

Section 21-36 of this Article is as follows:

"21-36. City to have fifty wards.) The city of Chicago shall be divided into fifty wards. In the formation of wards the population of each shall be as nearly equal as practicable and each shall be composed of contiguous and compact territory."

Section 21-38 of the said Article is entitled "Redistricting every ten years" the second paragraph of which reads as follows:

"On or before the first day of December of the year following the year in which the national census is taken, and every ten years thereafter, the city council shall by ordinance redistrict the city on the basis of the national census of the preceding year. All election of aldermen shall be held from the existing wards until a redistricting is had as provided for in this article."

It seems clear from the language of this paragraph that the Legislature intended that in redistricting the wards of the city, the city council should make the redistribution on the "basis of the national census of the preceding year". In this case on the basis of the 1950 national census. If the city council had followed the statute the redistricting ordinance now being considered by your body would have been enacted before the first day of December of 1951. The 1950 census showed the population of Chicago to be 3,620,962, dividing this figure by 50 would make the population of each ward 72,419. If you considered the alleged increase of 200,000 (which is not official) and divide the increase by 50 each ward would have an increased population of 4,000 over the census figures of 1950. Relatively this would make no difference in the size of the population of the wards, each being proportionately increased.

It is our opinion, if you proceed with the redistricting at this time it should be made on the basis of the 1950 census as provided by the statute. It is also our opinion that a new redistricting be made before the first day of December, 1961 based on the 1960 Federal census. In this way the ward lines of the city would be laid out for the first time since 1931 as the Legislature intended they should be.

REGULATE HOMING PIGEONS

(No. 12187—Committee on Health—R. N.—December 5, 1957.)

You submitted to this department draft of a proposed ordinance designed to include homing pigeons within the terms of Section 98-16 of the Code, which section provides (1) that any person having control of any estray or fowl, that shall permit any animal or fowl to go loose in any public way in the city shall be subject to a ten dollar fine, and (2) makes it the duty of

every police officer to impound in the municipal animal shelter any estray which he discovers.

The language of present Section 98-15 which defines estrays is identical to that which appeared in Section 865 of the Chicago Code of 1911. Provisions for the regulation of the nuisance created by estrays was in keeping with the needs of the time, when "horses, colts, cows, bulls, steers, pigs, sheep, lambs," etc. wandered into the streets of the city. Such provisions were carried from publication of code to code, without regard to the changing times, and now constitute a meaningless echo of outdated regulations. To now attempt to breathe life into the section so as to cover a situation almost entirely unrelated to the true context presents, in our opinion, more than one difficulty.

1. The business of raising and training homing pigeons is not *per se* a nuisance. If it is carried on in such a manner as to constitute a nuisance, steps to abate the nuisance would seem to be a proper solution.

2. A homing pigeon, except for its particular training and purpose, the value of which is undisputed and internationally recognized, is no different than any ordinary pigeon. How then, as a practical matter, can the police be charged with the responsibility of distinguishing between a homing pigeon and the ordinary pigeon which infests the city, so that he shall comply with the duty imposed upon him "to impound in the municipal animal shelters any estray which he discovers"?

3. In our opinion, any such discrimination between the municipal regulations of homing pigeons on one hand and ordinary pigeons on the other hand would be improper under the rule that laws must be general and operate uniformly upon all in like position (*Jones v. R. I. & P. Ry. Co.*, 231 Ill. 302).

CONCESSION LEASES

(No. 12227—State's Attorney—J. C. M.—May 26, 1958.)

Your letters, dated May 8, 1958 and May 20, 1958, addressed to Mayor Richard J. Daley, have been referred to this office for reply. In your letter of May 8th, you voiced your feelings toward the operation of rent-a-car service at the Chicago airports and ask that the Commissioner of Public Works co-operate with Mr. Merwin Hart of your staff in his investigation of such service. Mr. Hart has been accorded the information he sought. In your letter of May 20, 1958, you state:

"The Purchasing Act of the State of Illinois requires bids shall be taken and the lowest or highest bidder (as the case might be) giving the City the greatest return shall be awarded the contract."

Your position presents a legal question that can be resolved by an examination of the Statutes and an interpretation thereof made by the Corporation Counsel's Office in 1950.

The Sixty-Sixth General Assembly in 1949 amended the "Municipal Purchasing Act for cities in excess of 500,000 population", (Chapter 22A, Illinois Revised Statutes). Section 22A-3 "Purchase orders and contracts—competitive bids", provides for competitive bidding as to certain contracts therein specified. Section 22A-4 "Contracts not requiring competitive bids", was amended as follows:

"Regular employment contracts in the municipal service, whether with respect to the classified service or otherwise, shall not be subject to the provisions of this Article, nor shall this Article be applicable to the granting or issuance pursuant to powers conferred by laws, ordinances or resolutions, of franchises, licenses, permits or other author-

izations by the corporate authorities of the municipality, or by the departments, offices, institutions, boards, commissions, agencies or other instrumentalities thereof, nor to contracts or transactions, *other than the sale or lease of personal property, pursuant to which the municipality is the recipient of money.*"

Because the words "granting of any concession" were included in Section 22A-3, there appeared to be a conflict between the paragraphs. On January 20, 1950, the Corporation Counsel rendered an opinion (a photographic copy of which is attached hereto) construing the amendment of 1949 to Section 22A-4 and holding that:—"Pursuant to this amendment the Purchasing Act no longer applies to concessions granted by the City under the terms of which the City is to be the recipient of money".

This position is further fortified by the fact that the Sixty-Eighth General Assembly again amended the Purchasing Act by striking out the words "the granting of any concession" in Section 22A-3.

In the control and operation of the airport terminal buildings, the City of Chicago acts in its proprietary capacity (*Miami Beach Airline Service v. Orandon*, (Fla.) 32 So. (2) 153, 155). The corporate authority has control over city property and the authority to fix the terms of leases and determine the provisions thereof (Chap. 24, Section 59-1, Ill. Rev. Stats., 1957). There are no statutory requirements as to bids therefor except as provided by Section 59-2 of said Chapter which relates to leases for terms in excess of twenty years:

The rent-a-car service at the airports is provided for by leases authorized by the City Council on November 30, 1951, Midway Airport, for a term from January 1, 1952 to December 31, 1956; on July 28, 1954, O'Hare Field, for a term from August 16, 1954 to August 31, 1959; on April 22, 1953, Meigs Field, by addendum to the Midway lease and for a like term.

We are of the opinion that the power to grant leases for space in public properties is vested in the City Council and not in the Purchasing Agent and that such agreements do not come within the provisions of the Purchasing Act.

ED. NOTE: Conclusion affirmed in *Peo. ex rel. Adamowski v. Daley*, 22 Ill. App. 2d 87.

ACQUISITION BY CONSERVATION BOARD

(No. 12298—Community Conservation Board—E. L. N.—September 21, 1959.)

Your letter of recent date requested our opinion as to whether or not it is necessary for the City Council of the City of Chicago to approve the acquisition prices for individual parcels acquired pursuant to the Urban Community Conservation Act.

The Statute, Sections 91.8 through 91.16 of "An Act in relation to the conservation of urban residential areas, etc.", (¶s. 1-9, Ch. 67½, Ill. Rev. Stat. 1957), provides for the creation of the Community Conservation Board and defines the rights, powers and duties of the municipality in connection with the acquisition of property pursuant to the Act known as the "Urban Community Conservation Act."

The Community Conservation Board is designated an agent of the City of Chicago and has the duty to prepare a conservation plan for a given area prior to the acquisition of any property. This plan must be approved by a Conservation Community Council, the Community Conserva-

tion Board, and the governing body, which in our case is the City of Chicago. Section 91.12 specifically provides "that the governing body of the municipality shall by resolution adopt or reject such plan." The Legislature did not grant to the governing body any additional power to amend the plan, but it must either adopt or reject the plan as submitted.

In accordance with said statutory provision, the City Council adopted the Hyde Park-Kenwood Urban Renewal Plan, Journal of Proceedings, November 7, 1958, Page 8441. The City Council in said ordinance delegated to the Community Conservation Board of Chicago the following powers among others: "Review of acquisition procedures, approval of acquisition prices, and approval of all aspects of acquisition." Further, on the same page of said ordinance, the duties of the Law Department are set forth. The Law Department is given the power to review the appraisals, undertake negotiations, institute condemnation proceedings and to "close transactions at prices acceptable to the Community Conservation Board of Chicago and the Urban Renewal Administration."

The question as to whether an agency of the City of Chicago may acquire property in the name of the City of Chicago without prior City Council approval was decided in the case of *City of Chicago v. Jewish Relief Society*, 323 Ill. 389 (1926). In that case a Petition to Condemn was filed by the Board of Education in the name of the City of Chicago, as Trustee. The petition was challenged on the ground that consent of the City Council was not obtained. The Court found that the Legislature in a recent amendment to the Act did not require City Council concurrence, and further that the Legislature specifically granted to the Board the power to acquire property by purchase or condemnation for school purposes. It was held that the Board of Education is given the right to bring condemnation proceedings in the name of the City without the consent of the City Council.

Similar to the statutory provision in the foregoing case, the Community Conservation Board, in Section 91.13 of said Act, is granted the power to acquire real property by purchase, condemnation or otherwise, which is necessary or appropriate for the implementation of the plan. The Legislature did not grant to the governing body the power to pass upon the acquisition of individual property but only the power to adopt or reject the plan in its entirety.

It is to be noted that neither the Chicago Land Clearance Commission or the Chicago Housing Authority, which have similar powers to the Community Conservation Board, are required to obtain City Council approval for the acquisition of individual parcels.

It is, therefore, the opinion of this office that it is not necessary for the City Council of the City of Chicago to approve the acquisition prices for individual parcels acquired pursuant to the Urban Community Conservation Act.

B. POLICE DEPARTMENT

RIGHT OF POLICEMEN TO JOIN LABOR UNIONS

(No. 11779—Commissioner of Police—F. V. M. and C. H. L.—April 25, 1944.)

This will acknowledge receipt of your letter of April 15, 1944 wherein you say:

"An article appears in the daily press of this date to the effect that a certain number of policemen, of this department, have formed a union, referred to as 'Chicago and Cook County Law Enforcement Offi-

cer's Union, Local No. 785,' and have received a charter from the American Federation of Labor.

"It is requested that the undersigned be advised whether or not he can legally prevent members of this department, designated by ordinance as policemen, from organizing a union and affiliating themselves with the labor movement."

Investigation discloses that Local No. 785 is chartered by the American Federation of State, County and Municipal Employees which is a so-called International Union affiliated with the American Federation of Labor. The constitution of the American Federation of Labor contains the following statement of the objects of the Federation:

"ARTICLE II — OBJECTS

"Section 1. The object of this Federation shall be the encouragement and formation of local Trade and Labor Unions, and the closer federation of such societies through the organization of Central Trade and Labor Unions in every city, and the further combination of such bodies into State, Territorial, or Provincial organizations to secure legislation in the interest of the working masses.

"Section 2. The establishment of National and International Trade Unions, based upon a strict recognition of the autonomy of each trade, and the promotion and advancement of such bodies.

"Section 3. The establishment of Departments composed of National or International Unions affiliated with the American Federation of Labor, of the same industry, and which Departments shall be governed in conformity with the laws of the American Federation of Labor.

"Section 4. An American Federation of all National and International Trade Unions, to aid and assist each other; to aid and encourage the sale of union label goods, and to secure legislation in the interest of the working people, and influence public opinion, by peaceful and legal methods, in favor of organized labor.

"Section 5. To aid and encourage the labor press of America."

The American Federation of State, County, and Municipal Employees is one of the International Unions described in Section 3 of the Constitution of the American Federation of Labor above quoted and has been duly chartered by that organization. The Constitution of the International Union contains the following preamble:

"To improve and maintain the social and economic welfare of all employees of state, county, and municipal governments without regard to color, race, or creed, to promote efficiency in government, and to give clear evidence of our recognition of our unity with organized labor, we adopt this constitution."

The Constitution contains the following statement of the objects and methods of the organization:

"ARTICLE II

OBJECTS AND METHODS

"Section 1. The objects of this organization shall be:

"a. To promote efficiency in public service generally.

"b. To cooperate in giving efficient service to our respective jurisdictions.

"c. To bring local organizations of state, county and municipal employees into closer relationship so as to foster mutual cooperation.

"d. To extend and uphold the principle of merit and fitness in public employment and to promote civil service legislation.

"e. To establish and maintain a clearing-house of information and a research service for affiliated locals.

"f. To foster and promote by education a new public attitude toward public administration.

"g. To advance the general, social, and economic welfare of state, county, and municipal employees.

"h. To promote organization of workers generally and of public employees in particular.

"Section 2. The methods of obtaining the objects of this federation shall be by petitioning, by creating and fostering sentiment favorable to proposed reforms, by cooperating with the state and local officials, by promoting legislation, and by other lawful means."

On March 24, 1943 the General Executive Board of the American Federation of State, County, and Municipal Employees took the following action as appears from the minutes of the General Executive Board meeting:

"It was moved that the General Executive Board direct that a 'no-strike' provision be included in all charters issued to affiliated local unions which comprise police officers, and that at the discretion of General President Zander the same or similar provision be included in charters issued to other occupational groups. This motion was seconded and carried."

The International Union has issued a charter to Local Union No. 785 of which some of the policemen of the City of Chicago have become members. The local union has not yet adopted a Constitution. Presumably the objects and methods will be in conformity with those of the International Union with which it is affiliated.

For many years there have existed a number of organizations of policemen of the City of Chicago. The Policemen's Benevolent Association of Chicago was organized February 18, 1868, and incorporated January 27, 1877. The object of this association is thus stated in its Constitution:

"ARTICLE II — OBJECT

"Section 1. The particular business and object for which this Association is formed, is to establish a fund for the payment of death benefits to the families, heirs, blood relations, affianced wife of, or dependents of the deceased members of the Association."

The second organization is known as the Chicago Patrolmen's Club and was organized May 14, 1916. Section 2 of Article I of the Constitution of the Organization declares:

"The object of this organization shall be to promote and develop a friendly and fraternal spirit among all the patrolmen of the police force of the City of Chicago; and to advance their mutual interest and to extend both moral and material aid to its members; to encourage athletics, and tests of strength and skill; and to generally increase the efficiency of the individual members of the department as public servants."

Other organizations of Chicago police officers, the constitutions of which we have thus far not been able to obtain are: Police Sergeants' Association, Police Lieutenants' Club and Police Captains' Club.

The legality of these organizations does not appear to have been questioned, and their continued existence is a recognition of their constitutional rights to assemble peaceably and to petition.

Your request for an opinion concerning the legality of an organization of policemen affiliated with the American Federation of Labor requires an examination of the nature and function of a labor union and the possible distinctions between a labor union and an organization such as those which have existed unquestioned for many years in this city.

Dangel and Shriber in their excellent work on Labor Unions (1941) defines a labor union as follows (section 1, page 3) :

"A labor union is a combination or association of workers in some trade or industry, or in several allied trades, which exists for the purpose of securing, by concerted action, the most favorable wages, hours and conditions of labor, and otherwise improving their economic and social status, and for the purpose of negotiating matters arising between them and their employers through the intermediation of officers of the union."

In *Kemp v. Division No. 241*, 255 Ill. 213 (1912) the Supreme Court of Illinois said, at page 220 :

"Labor unions have long since been recognized by the courts of this country as a legitimate part of the industrial system of this nation. The ultimate purpose of such organizations is, through combination, to advance the interests of the members by obtaining for them adequate compensation for their labor, and it has been frequently decided by the American courts that the fact that this purpose is sought to be obtained through combination or concerted action of employees does not render the means unlawful. * * * Again, in *Wilson v. Hey*, 232 Ill. 389, we said : 'The right of laboring people to organize for the purpose of promoting their common welfare by lawful means is fully recognized.'"

In the work on Labor Unions above cited the authors say (section 95C, page 111) :

"The function of a labor union is to increase the individual bargaining power by collective action and thus to promote the common interest of its members. The principles of collective bargaining and of cooperative unions are well established in the industrial life of the country. Labor has a right to organize and through its officers or agents to make demands for wages and hours of labor, they may deem to be right. When organized, workers may use the organization to promote their social, civic and economic betterment, and among other things, that of securing as much as they can for their labor. The law recognizes that employees have a legitimate *de facto* interest in concerted action for the purpose of improving their economic condition. Higher wages, better working conditions and the legitimate advancement of the members' welfare are lawful union objectives. Unions are formed for mutual aid, benefit and the protection of workmen in the matter of wages and other incidental benefits. A labor union seeks to promote the welfare, safety and happiness of its members. Collective action on the part of employees for the purpose of securing the redress of grievances, of promoting agreements with employers relating to pay and conditions of work is recognized everywhere."

With each sentence supported by citation of courts of last resort in the various states in the Union, the authors describe the beneficial role played by labor unions in present day society (Section 95D, page 112) :

"Beneficial results to society, as well as to employees, individually and as a class, have come from an assertion of the collective force of employees. Labor unions, though organized for the benefit of their members, are conducive to the well being of society and are a necessary part of the social structure. Irrespective of our trade or calling, we are all, individually and collectively, more or less dependent upon labor and whatever will benefit labor necessarily benefits capital and is conducive to social welfare. The economic independence, security and con-

tentment of labor are essential for the public order and welfare. The amelioration of the conditions of labor is now regarded by an enlightened government as a duty of paramount importance. And this solicitude for the worker is for the common good as well as for the benefit of the working class. It is essential for the public welfare that the economic security and contentment of the class that contributes to its material needs, be sedulously maintained. Both the present and future welfare of society demand that capital and labor shall deal justly, fairly and considerately with each other, the vital interests of both being interdependent."

In the opinion of this department to you on March 31, 1937 dealing with the legality of unions and the right to strike and picket, we traced the struggle for labor unions to establish their right to existence and to employ the weapon of the strike and its incident peaceable picketing. On the basis of statutory law and judicial decision we concluded:

"1. Labor unions are legal under Illinois and Federal jurisprudence.

"2. The strike is a lawful instrument in a lawful economic struggle or competition between employer and employees.

"3. Picketing, as the term is generally understood is lawful in Illinois when peaceable and without the elements of coercion, or intimidation or disorder."

We advised that the Police Department of the City of Chicago take no action to interfere with picketing when such picketing is conducted in a peaceable manner (Opinions of the Corporation Counsel, Volume XIX, page 110).

In an address delivered before the Chicago Chapter of the National Lawyers' Guild on March 21, 1938, the Corporation Counsel reiterated the views which he had previously expressed in this formal opinion to you:

"To lawyers it may seem elementary to labor the point that labor unions are legal in Illinois. However, I suspect that even at this date there are many persons who still think that labor unions are somehow outside the pale of the law. I have the feeling that a good deal of labor trouble, even today, results from the fact that certain people do not in their hearts believe that working men and women have the legal right to organize themselves into labor unions.

"That is why, when the Department of Law of the City of Chicago was called upon for an opinion on picketing in March, 1937, the department made it a point to stress prominently in its opinion the proposition that labor unions are legal under Illinois and Federal jurisprudence. Incidentally, it is my belief that if that one simple proposition could be made clear to all persons involved in labor disputes, much of the psychological resistance to sane and reasonable methods for settling labor troubles would be overcome. The thought that labor unions may be illegal has been difficult to destroy because of confusion over the legal term 'conspiracy,' with which may be linked the word 'combination.' It appears that in some jurisdictions, combination was illegal *per se*. However, the viewpoint in Illinois was expressed by the Illinois Supreme Court in the notable *Kemp* case (*Kemp v. Division* No. 241, 255 Ill. 213 (1912)) when the court said that 'the clear weight of authority holds that what one individual may lawfully do, a combination of individuals has the same right to do provided they have no unlawful purpose in view.' That statement strikes me as being basic on the question of the legality of labor unions in Illinois."

The right to organize has been well expressed by the court in *Evening Times Printing & Publishing Company v. American Newspaper Guild*, 122 N. J. Eq. 545 (1937) at page 548:

"I take this occasion to state that the court recognizes, and will sustain, the right of the defendant employees to organize, to bargain

collectively, and to choose freely their own representatives. They have just claims to a reasonable living wage; to healthful working conditions; and to security of employment without unfair discrimination. They hold the right to enforce their demands by effective means; but those means must accord with the rights of others and the letter and spirit of the law. The right to organize is not only a legal right, but it is a natural right—it is a God-given right which formed society and moulded government.”

The right of employees in private industry to organize into trade or labor unions, to bargain collectively, and to exercise the traditional instruments to enforce their demands is not here involved. That right is now too well established to be questioned.

The relation existing between government and its employees is in many fundamental respects radically different from the relationship existing between private employer and employee. Is the uniqueness of the employer-employee relationship in government such as to deprive the public employee of the right to organize which is universally conceded to private employees?

It should be observed that the same compelling necessity for private employees to organize does not exist as to public employees. The civil service laws in significant respects accomplish some of the important objectives of unions such as security of tenure and seniority (Civil Service Law, Ill. Rev. Stat. 1943, chap. 24½, par. 39 *et seq.*). Statutory pension and annuity plans (Ill. Rev. Stat., 1943, chap. 24, pars. 945 *et seq.*) further accomplish an aim sought and sometimes achieved by unions. Public hearings on appropriation ordinances fixing salaries afford opportunities obtainable in private industry only through the instrumentality of a union. Vacations with pay and sick leaves are customary incidents of public employment while in private industry these advantages are secured only through collective bargaining.

In the history of industry, the right to organize is a comparatively recently won victory by workers. The claim to an extension of that right to public employees is even more recent. As a consequence there is a dearth of statutory law and judicial decision passing upon this question. In the main a decision must be made upon the basis of analogous cases and the application of the fundamental principles of the right to organize.

In *Hagan v. Pickard*, 12 N. Y. Sup. (2d) 873 (1939) the court upheld the right of public employees to organize (page 875):

“I find nothing in the statute which renders unlawful the organization of public employees for their mutual welfare and benefit. They have the same right to mutual help and assistance that other citizens have—and to group themselves together for that purpose. Concededly the unincorporated form of organization of public employees is not unlawful. If it were, the units now in existence would be disbanded by public authorities and their members prosecuted.”

This decision was affirmed by the Appellate Division of the State of New York (14 N. Y. Sup. (2d) 706 (1939)).

Opposed to this view is the decision of the trial court in *Railway Mail Association v. Murphy*, 44 N. Y. Sup. (2d) 601 (1943) where the court said, page 607:

“To tolerate or recognize any combination of civil service employees of the government as a labor organization or union is not only incompatible with the spirit of democracy but inconsistent with every principle upon which our government is founded. Nothing is more dangerous to public welfare than to admit that hired servants of the state can dictate to the government the hours, the wages and conditions under which they will carry on essential services vital to the welfare, safety and security of the citizen. To admit as true that government employees have power to halt or check the functions of government, unless their demands are satisfied, is to transfer to them all legislative, executive and judicial power. Nothing would be more ridiculous.”

The court concluded that the organization of railway postal clerks was not and could not be a labor organization and that the mere fact that the American Federation of Labor had issued to the plaintiff organization a certificate of affiliation in no way repealed, rescinded or amended the charter granted to the plaintiff to transact insurance business. In consequence of this declaratory judgment, the plaintiff organization was held not to come within the scope of the Civil Rights Law prohibiting discrimination by labor organizations. It was accordingly held that the organization had a right to restrict membership to those of the Caucasian race or native American Indians.

The opinion of the court does not condemn all organizations of public employees. It condemns labor organization which has for its purpose "collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection."

This case was appealed to the Appellate Division of the State of New York. On March 7, 1944 the decision of the trial court was reversed by a unanimous court. The decision has not yet been officially reported. An examination of a copy of the opinion discloses that the court held the association to be a labor union based upon the activity of the association and its affiliation with the American Federation of Labor. Since the association was a labor union, it was required to comply with the Civil Rights Law and could not restrict its membership by reason of race, color or creed. The trial court had squarely held that the association was not, and under the law could not be a labor union because its membership consisted of public employees. The decision of the court of review is in flat contradiction to this view. Its decision holds that the association is a labor union and essentially recognizes the propriety of such union by holding that the union must comply with the Civil Rights Law prohibiting discrimination by labor organizations.

A survey by the National Institute of Municipal Law Officers conducted in 1941 discloses that public employees in many municipalities have become members of labor unions although the consensus of opinion of municipal law departments and state attorneys general appears to be that municipalities have no power to enter into a contract with such labor unions (Report No. 76, August, 1941, National Institute of Municipal Law Officers, Power of Municipalities to Enter into Labor Union Contracts—A Survey of Law and Experience). Personal inquiry by this department since the receipt of your request for an opinion among approximately thirty municipalities discloses that policemen have joined labor unions and that such unions have been tacitly tolerated. Formal legal opinions have not been requested of or rendered by the law departments of those cities concerning the legality of such policemen's unions. The legality of such organizations has not been questioned.

On August 16, 1937 the President of the United States in a letter addressed to Mr. Luther C. Steward, President, National Federation of Federal Employees, said:

"Organizations of government employees have a logical place in government affairs.

"The desire of government employees for fair and adequate pay, reasonable hours of work, safe and suitable working conditions, development of opportunities for advancement, facilities and fair and impartial consideration and review of grievances, and other objectives of a proper employee relations policy, is basically no different from that of employees in private industry. Organization on their part to present their views on such matters is both natural and logical, but meticulous attention should be paid to the special relationships and obligations of public servants to the public itself and to the government.

"All government employees should realize that the process of collective bargaining as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and

purposes of government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with government employee organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employees alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters.

"Particularly, I want to emphasize my conviction that militant tactics have no place in the functions of any organization of government employees. Upon employees in the Federal service rests the obligation to serve the whole people, whose interests and welfare require orderliness and continuity in the conduct of government activities. This obligation is paramount. Since their own services have to do with the functioning of the government, a strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of government until their demands are satisfied. Such action, looking toward the paralysis of government by those who have sworn to support it is unthinkable and intolerable." (For text of this letter see page 24 of Report No. 76 of the National Institute of Municipal Law Officers above cited.)

On April 7, 1941 Mayor LaGuardia of the City of New York in a letter to the Chairman of the Board of Transportation in discussing a communication from the Transport Workers Union asking a conference for the purpose of negotiating an agreement declared that it was legally impossible for such an agreement to be executed. He further declared:

"Every employee is free to pay dues to any lawful organization if he so desires.

"No department will coerce any employee to become a member of any organization or coerce anyone not to become a member of any lawful organization." (For text of this letter see page 25 of the report above cited.)

One additional aspect of the situation must be considered in arriving at a determination of the right of policemen to join a labor union and that is the peculiar status of police officers among public employees. In *Raycraft v. Harrison*, 108 Ill. App. 313 (1903) the Appellate Court of Illinois described this unique status in these words (page 315):

"The police force of the city of Chicago is a quasi-military organization. No one is compelled to belong to it, but whosoever voluntarily engages in such service necessarily limits the right of action which, as a mere private citizen, and in no sense a public official, he would have."

The case involved the validity of an order promulgated by the General Superintendent of Police prohibiting membership in any organization except the Policemen's Benevolent Association, which order specifically prohibited membership in the Policemen's Protective Association. The suit was brought to declare the order unlawful and beyond the scope of the authority of the Superintendent of Police. The court refused to pass upon this question holding that the action in equity was improperly brought and that the plaintiff was compelled to wait until he was suspended for a violation of the order, whereupon he could bring an appropriate action at law.

In *Coane v. Geary*, 298 Ill. App. 199 (1939), the Appellate Court of Illinois again had occasion to describe the unique position of a police officer in the scheme of government. The court quoted with approval from an opinion of a judge of the Circuit Court of Cook County rendered in 1904 wherein it was said:

"A police force is peculiar, *sui generis*, you may say, in its formation and in its relation to the city government. It is practically an organized force resembling in many respects a military force, organized under the laws of the United States and equally as important as to the functions it is required to perform.

"It is not an ordinary branch of the executive government like the mayor's office even, your water department, the comptroller's department, the health department, even; but, as I say, it is peculiar to itself, and to look at it in the same light that other branches of the executive department are regarded would be a mistake in a judicial decision. It is a department which requires that the members of it shall surrender their individual opinion and power to act, and submit to that of a controlling head just as much as the common soldier must surrender his own opinion and power of action to that of his commanding officer. And there is the same necessity of discipline—of regulation existing in the police department that exists in regard to the military department. Strict discipline must be enforced, and it must be enforced in a manner that is effective, and without the supervision or regulation of any other department of the state, and particularly, without any attempt on the part of the judicial department (which is a branch of the government entirely distinct and separate from the executive department), to regulate it in any way, and particularly, to regulate its discipline."

It is our opinion based upon a careful consideration of the foregoing authorities and circumstances that there is nothing in the unique status of a police officer which would deprive him of the right to join any lawful organization which he may consider advisable to obtain a betterment of his economic and social status. The objects and methods stated in the constitutions of the American Federation of Labor and the American Federation of State, County and Municipal Employees are those which police officers individually or collectively could seek to attain.

However, by reason of the fact that police officers are public employees and occupy a unique status among public employees, such organization suffers certain inevitable disabilities so far as its authority and activities are concerned. What may be perfectly proper on the part of organizations of employees in private industry becomes improper and perhaps incompatible with their legal duties when sought to be effected by organizations of public employees. The disabilities of organizations of public employees, and the limitation of their powers and scope of activities will be discussed so that police officers can fairly appraise the limits of the benefits which any union may lawfully secure on behalf of its membership.

The principal limitation upon an organization of public employees is the lack of power to call a strike. As we have already stated, the charter of the local union contains a no-strike clause. In our opinion this is compelled by law.

There appears to be no statutory law or judicial decision squarely passing upon the question, although in *O'Kelly v. Collins*, 281 Ill. App. 604 (1935) the Appellate Court of Illinois sustained the action of the Civil Service Commission in discharging a motor truck driver, a member of a union (Local No. 726) who went on strike in obedience to the order of the union.

The overwhelming consensus of legal and socio-economic opinion holds as untenable the right of public employees to strike—a right generally recognized as an essential tool of the organized labor movement. Particularly abhorrent is the use of the strike by public employees engaged in governmental functions as contrasted to proprietary functions. Especially reprehensible is the use of the strike and other accepted practices of organized labor in the case of employees engaged in protection of the public.

At the time of the Boston police strike in 1919, Governor Coolidge of Massachusetts, later President of the United States, branded the walkout of Boston police as "desertion of duty." Coolidge asserted that no citizen has the right to strike at any time against the state.

President Woodrow Wilson, recognized for many years as a symbol of progressive government referred to the Boston police strike as "an intolerable crime against civilization."

The late Samuel Gompers, at that time President of the American Federation of Labor and widely recognized as the "father of the American labor movement" asserted:

"When policemen accept charters from the A. F. of L. it is with the distinct understanding that strike action will not be resorted to and no obligation is assumed which in any way conflicts with their oaths or duty."

We have already earlier in this opinion quoted President Roosevelt as declaring:

"Since their own services have to do with the functioning of the government, a strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of government until their demands are satisfied. Such action, looking toward the paralysis of government by those who have sworn to support it is unthinkable and intolerable."

It must be remembered that policemen are municipal officers. As such they are sworn to discharge their duties faithfully. For failure to discharge their sworn duties drastic penalties are provided for by statute. It may very well be that a strike by a policeman would render him indictable under Section 9-92 of the Revised Cities & Villages Act (Ill. Rev. Stat. 1943, chap. 24, par. 9-92) which provides:

"Every municipal officer who is guilty of a palpable omission of duty, or who is guilty of willful and corrupt oppression, malconduct, or misfeasance in the discharge of the duties of his office, shall be liable to indictment in any court of competent jurisdiction and, on conviction, shall be fined not exceeding \$1,000.00. The court in which such conviction is had shall enter an order removing the convicted officer from office."

A collective bargaining agreement is the usual outcome of negotiations between the employer and the union as a representative of the employees. It has been aptly said that:

"The making of a collective labor agreement is one of the most important goals of union labor policy. * * * Hours, wages, scales, and equitable division of work may be dealt with and agreed upon by definition. Such objects as strikes, lockouts, seniority, collection of dues by check-off, and recognition of a union as the collective bargaining agent may also be embodied in these agreements." (Labor Unions, Dangel and Shriber, 1941), section 305, page 333.)

It is our opinion that under the law of Illinois a union of public employees cannot achieve this most important goal of a labor union. The relationship between municipality and employee in Illinois is a noncontractual one (*Hughes v. Traeger*, 264 Ill. 612 (1914); *Goldstine Realty Co. v. City of Chicago*, 306 Ill. App. 556 (1940)). The subject of hours, wage scales, and division of work cannot be made the subject of a lawful contract. The compensation of municipal employees is fixed by the annual appropriation ordinances for the ensuing fiscal year. Valid contracts must be supported by a previous appropriation. Aside from the essential noncontractual nature of the employment, the mechanics of fixing the compensation renders it impossible to enter into a collective labor agreement. Prior to the passage of the annual appropriation ordinance a valid contract cannot be consummated because of the non-existence of an appropriation. Subsequent to the passage of the annual appropriation ordinance, an agreement would be useless because the compensation would be irrevocably fixed in the annual appropriation ordinance. The activities of the union must necessarily be limited to negotiations looking toward incorporation of the requested salary rates in the appropriation bill. Aside from the question of compensation, the hours, conditions of employment and rights and duties of employees are necessarily established by municipal ordinance and cannot become the subject of contract. Municipalities cannot bargain away their legislative powers.

Another well recognized and traditional instrument of accomplishing the objectives of a labor union is the device of a closed shop agreement whereby the employer agrees to employ only members of the union which is recognized as the exclusive bargaining agent. This device also is not available to the organization in question.

"Obviously appointments and promotions in the civil service must be determined upon merit and fitness, under suitable regulations adopted by commissions created by the civil service law under the mandate of the Constitution. The right to appointment depends upon merit and fitness, not upon membership in a labor organization." (*Petrucchi v. Hogan*, 27 N. Y. Sup. (2d) 718, at page 725.)

See also the following cases which bear upon the analogous question of imposing the requirement of union labor in connection with public works contracts:

Adams v. Brenen, 177 Ill. 194 (1898) ;

Holden v. Alton, 179 Ill. 318 (1899) ;

Fiske v. People, 188 Ill. 206 (1900).

In this connection it is worthy of note that Joseph A. Padway, General Counsel for the American Federation of Labor in a paper read at the Labor Law Conference held by the National Lawyers' Guild in Washington, D. C., March 7th and 8th, Collective Bargaining in Government Enterprise, stated (*Lawyers' Guild Review*, Volume II, No. 2, March, 1942, page 6) :

"The meager adjudications to date on this question hold that a closed shop agreement between a government agency and a union is void on the ground that it constitutes unlawful discrimination."

Another of the traditional implements of effective union organization is the "check-off" system which is a method of deducting from an employee's pay at prescribed periods, the amounts due to the union for fees, fines, or assessments. In our opinion this advantage cannot be enjoyed by a union of public employees. It was early decided in this state that "a municipal corporation cannot be properly turned into an instrument or agency for the collection of private debts." (*Merwin v. City of Chicago*, 45 Ill. 133, at page 136 (1867)). That principle was enunciated in the course of an adjudication that municipal corporations in this state are not subject to the process of garnishment. The principle was recently affirmed in *Lamb v. Lamb*, 256 Ill. App. 226 (1930).

Freedom from interference from the employer concerning his decision to join or refrain from joining a union is at present an undoubted right of an employee in private industry. That, however, does not appear to be a right possessed by public employees. In *People ex rel. Fursman v. City of Chicago*, 278 Ill. 318 (1917), the Supreme Court of Illinois upheld the right of the Board of Education of the City of Chicago to promulgate a rule prohibiting teachers from joining labor unions. The matter was regarded as a question of policy which was solely for the determination of the Board and not subject to review by the court.

It should be noted that this decision was rendered five years after the landmark ruling in *Kemp v. Division No. 241*, 255 Ill. 213 (1912) upholding the right of employees generally to organize. The opinion of the court in each case was written by Mr. Justice Cooke. It is an inescapable conclusion that the court in full awareness of the right to organize determined that such right is not an absolute one. In the case of public employees the right is a qualified one dependent upon the legislative and administrative policy of the governmental agency.

It is true that the *Fursman* case was decided before the effective date of the Otis School Law of 1917 (Ill. Rev. Stat., 1943, chap. 122, par. 161) which made the tenure of school teachers perpetual and in other respects

limited the former broad powers of the Board of Education (See *Armstrong v. City of Chicago*, 247 Ill. App. 584 (1928)). However, we do not perceive that this circumstance affects the force of the opinion. The opinion rested on the basis of the absolute right of the governmental agency to determine policy relating to membership of employees in labor unions.

Courts in other states have also upheld rules of governmental agencies prohibiting employees from belonging to labor unions (*Carter v. Thompson*, 164 Va. 312, 180 S. E. 410 (1935); *Seattle High School Chapter No. 200 v. Sharples*, 159 Wash. 424, 293 Pac. 994 (1930); *Hutchinson v. Magee*, 278 Pa. 119, 122 Atl. 234 (1923); *McNatt v. Lawther*, 223 S. W. 503 (Ct. of Civil App. Tex., 1920)). In some of these cases the employees were in the classified civil service but that fact did not affect the power of the governmental agency to promulgate the rule.

Upon the authority of the *Fursman* decision and the other cases supporting it, we have no alternative but to hold the City Council of the City of Chicago, the Civil Service Commission of the City of Chicago and the Commissioner of Police of the City of Chicago have the power in their legislative and administrative discretion by appropriate action to prohibit police officers from joining a labor union. At the present time there is no statute, ordinance, rule of the Civil Service Commission or rule of the Department of Police prohibiting policemen from joining labor unions.

As we have already indicated, the problem of unionization of public employees is comparatively recent. It is impossible to foresee and discuss every possible aspect of the consequences flowing from organization of public employees. We have selected the few outstanding presently known instruments and devices employed by labor unions to accomplish their ends and have indicated the stringent limitations upon organizations of public employees. We do not wish to be understood as expressing an opinion that organizations of public employees may engage in all of the activities pursued by unions of private employees which we have not discussed. We reserve for future decision any question on specific situations. The only question squarely passed upon by this opinion is the bare right of the police officers to join the union and the power of the Police Department or other proper agency to prohibit such organization. We have discussed other phases of the problem to avoid any interpretation that in sanctioning the right of police officers to pay dues to any lawful organization if they so desire, we thereby recognize the authority of the union as an effective agency for any purpose.

While the union is affiliated with the American Federation of Labor and professes to be a labor union, we are not prepared to express any opinion concerning its character. When we consider that the union by law is stripped of the most fundamental of the traditional instruments of achieving its purposes, it may be that the organization cannot be accurately denominated a labor union.

For your convenience we summarize the foregoing opinion:

1. For many years the Police Department of the City of Chicago has upheld the constitutional right of peaceable assembly and petition by countenancing the following organizations of policemen of the city: Chicago Patrolmen's Club, Policemen's Benevolent Association of Chicago, Police Lieutenants' Club, Police Sergeants' Association and Police Captains' Club.
2. The police officers individually or collectively have no right to strike for any reason at any time under any circumstances.
3. The union does not have the right to insist upon recognition as an exclusive bargaining agent of the police officers, and the city is without power to enter into a contract concerning any of the elements of the employer-employee relationship.
4. The union does not have the power to demand nor does the city have the power to enter into any closed shop arrangement.

5. The union does not have the right to request nor does the city have the power to enter into a check-off arrangement.

6. On the authority of *People ex rel. Fursman v. City of Chicago*, 278 Ill. 318 (1917), the City Council of the City of Chicago, the Civil Service Commission of the City of Chicago, and the Police Department of the City of Chicago all possess the power to prohibit police officers from becoming members of a labor union.

DESTRUCTION OF RECORDS UPON ACQUITTAL

(No. 11827—Commissioner of Police—W. J. K.—June 11, 1954.)

Your request of June 4, 1954, for an opinion from this office, in reference to a letter from attorney, George M. Sus, 135 So. LaSalle Street, wherein he seeks (1) "to destroy all pictures, prints, cards and other matter in the arrest of one B..... M. Z.....", (2) "to eliminate any reference to narcotics", and (3) "to have a document entry of the final court order, finding the said B..... M. Z..... not guilty of contributing to the delinquency of three minor girls." Attached to your letter are communications from the commanding officer of the Bureau of Identification, Lieutenant James E. Devery, and the commanding officer of the Narcotic Bureau, Lieutenant Joseph Healy. In Lieutenant Devery's communication, the records of the Bureau of Identification show:

"B..... M. Z.....

12-29-53—Investigation, (Narc.)—Arr. Offs. Whalen, Socon, Kissane & Novak, 24th Dist.

1-14-54—90 Days Supervision of court, viol. Par. 103-104-Ch-38—(Delinquent Child)—(3)—Judge Wells, Arr. Off. Whalen & Co., 24th Dist."

There are also attached certified copies of transcript of proceedings and findings of the Municipal Court of Chicago in case Nos. 53-MC-75262, 53-MC-75260 and 53-MC-75261, showing, in each and every instance, that the afore-said B..... M. Z..... was found not guilty and discharged, to-wit:

"THE COURT FINDS THE DEFENDANT NOT GUILTY. WHEREFORE IT IS CONSIDERED BY THE COURT THAT THE DEFENDANT IS NOT GUILTY OF THE OFFENSE CHARGED AGAINST HER IN THE INFORMATION HEREIN AND IT IS ORDERED BY THE COURT THAT SAID DEFENDANT BE DISCHARGED AND GO HENCE WITHOUT DAY".

In order that the records of the Bureau of Identification may show a true and correct status of the record of the above named subject, relating to her arrest, the following is recommended, that is that an entry be made of the finding of the Municipal Court of Chicago, in case Nos. 53-MC-75262, 53-MC-75260 and 53-MC-75261, as recited in the certified copies of the transcript of proceedings, that defendant was found not guilty.

As for the request "to destroy all pictures, prints, cards and other data relating to the arrest of the above named subject", this office, in a comprehensive opinion submitted to your office, dated December 14, 1942, (in Vol. 21, page 21, "Opinions of the Corporation Counsel") held that fingerprints, photographs and other identification of persons arrested and charged with crime are public records and documents kept in the manner designated by law and cannot be removed or destroyed for any reason by anyone who happens to have them in their custody or possession.

It is, therefore, our opinion that your department does not have the authority to alter, destroy or remove from the files of the Police Department any of its records pertaining to photographs, fingerprints or other records of identification pertaining to the arrest of the subject herein.

I am returning herewith the certified copies of transcript of Municipal Court proceedings.

ED. NOTE: See *Kolb v. O'Connor*, 14 Ill. App. 2d 81 (1957).

RETURNING CRIMINAL IDENTIFICATION RECORDS

(No. 11957—Commissioner of Police—J. R. B.—September 19, 1955.)

In your letter of recent date, you request advice as to what your position should be as to the return of certain records concerning Mr. T..... B..... which were turned over to the State Bureau of Records and Identification.

Section 5 of an act in relation to criminal identification and investigation requiring sheriffs and chief police officers to furnish copies of finger prints to the State Bureau of Records and Identification provides as follows:

"It is hereby made the duty of the sheriffs of the several counties of this state and of the chief police officers of all cities, villages and incorporated towns in this State to furnish to the bureau, daily, copies of fingerprints on standardized eight by eight inch cards, and descriptions, of all persons who are convicted of felonies; and of all persons in whose possession at the time of arrest are found goods or property reasonably believed by such sheriffs or chief police officers to have been stolen; and of all persons in whose possession are found burglar outfits or burglar tools or burglar keys or who have in their possession high power explosives intended to be used for unlawful purposes or who are in possession of infernal machines, bombs or other contrivances, in whole or in part; intended to be used for unlawful purposes; and of all persons who, at the time of arrest, are in possession of firearms or other deadly weapons, intended to be used for unlawful purposes; and of all persons who have in their possession, inks, dye, paper or other articles necessary in the making of counterfeit notes, or in the alteration of bank notes or dies, molds or other articles used in the making of counterfeit money and intended to be used by them for such unlawful purposes. All photographs, finger prints or other records of identification so taken shall, upon the acquittal of the person charged with the crime, or upon his being released without being convicted, be returned to him." (Ill. Rev. Stats. 1941, chap. 38, par. 7800.)

The above quoted provisions of the act imposed a duty on the Commissioner of Police to furnish to the State Bureau of Records and Identification copies of finger prints and descriptions of persons convicted of felonies and of persons arrested in the case therein enumerated. These provisions of the act further provide that all photographs, finger prints and other records of identification so taken of a person charged with any of the crimes specified shall upon the acquittal of the person charged with the crime or upon his being released without being convicted be returned to him.

These latter provisions of the act quoted above authorizing the removal of the records specified therein are applicable only to the copies of the records expressly required to be furnished to the State Bureau of Records and Identification and they do not authorize the removal of the original records of the Police Department to which the above section of the act makes no expressed reference whatsoever.

It is, therefore, our opinion that you do not have authority to remove from the files of the Police Department any photographs, finger prints or any

other records of identification or information pertaining to Mr. B..... If Mr. B..... qualifies under said Section 5, he would be entitled to the return of the copies of records sent by the Police Department to the State Bureau of Records and Identification and should, therefore, direct his request for the return of said records to the State Bureau of Records and Identification.

APPOINTMENT OF SPECIAL POLICE

(No. 11973—Commissioner of Police—C. H. L.—October 24, 1955.)

We have before us your communication dated October 12, 1955 in which you say that you have received a request from Mr. John E. Meegan, Superintendent, Chicago Parental School, 3600 W. Foster Avenue in which he states:

"I am requesting the appointment as special police, City Employees John P. O'Shea and John St. Lawrence, both employed by the Board of Education as bonded truant officers in charge of returning parolees to the Chicago Parental School. Their duties which involve returning to the Parental School boys who have been committed by the Family Court and have broken their parole."

You request our opinion as to whether these men are entitled to be commissioned as special policemen.

The subject of special police is covered by Chapter 173 of the Municipal Code of Chicago.

Section 1 of said Chapter gives the definition of "special policeman" as follows:

"The term 'special policeman' is hereby defined as any person who, for hire or award, shall guard or protect any building, structure, premises, person, or property within the city * * *."

Section 3 of said chapter provides:

"An application of any person showing the necessity of appointment as a special policeman shall be made to the commissioner of police. The commissioner of police shall have power to appoint and swear in any number of special policemen to do special duty at any fixed place in the city, * * *."

Section 11 of said chapter provides:

"Every special policeman shall conform to and be subject to all the rules and regulations governing police officers of the city, and to such additional rules and regulations as the commissioner of police may make concerning special policeman. Special policemen shall possess all the powers of the regular police patrol at the places for which they are respectively appointed or in the line of duty for which they are engaged. * * *"

In *Komorawski v. Boston Store of Chicago*, 263 Ill. App. 88 it was held that special policemen are under the general supervision and authority of the Commissioner of Police although not in the regular police service and though employed at the expense and charge of the applicant. Chapter 173, Sections 3 and 11, Municipal Code of Chicago.

In our opinion No. 9500 dated April 22, 1937, Vol. 19, page 28 we held that special police possess the power of the regular police patrol (Ch. 173, Section II) but only at the designated places for which they are appointed or in the line of duty for which they are engaged.

In our opinion No. 8891 dated October 4, 1935, Vol. 18, page 106 we held that while the Commissioner of police is empowered to appoint special policemen for duty at a fixed place, it is within his discretion to extend the place of duty to a definitely circumscribed area.

It is clear from the provisions of the Municipal Code as above set out and from the above opinion of the Corporation Counsel that the commissioner of police has the power to appoint special policemen for duty at a fixed place in the city or for duty within a specifically designated area within the city.

The duties as described by Superintendent Meegan do not indicate whether the proposed special policemen would be employed at a fixed place or within a definitely circumscribed area of the city.

We are, therefore, of the opinion that the Commissioner of police is not empowered to appoint the above mentioned men as special policemen.

FUNERAL ESCORT SERVICE

(No. 12028—Commissioner of Police—J. R. B.—April 6, 1956.)

In your letter of recent date you forwarded an ad from a local paper advertising an official funeral escort service operated by the Star Detective Agency and requested our opinion as to the legality of such an operation. The ad shows the vehicle as being equipped with a Mars light and bearing descriptive lettering. It also mentions a "safe journey for all who are legally entitled to motorized escort."

Chapter 95½, Section 210 (Ill. Rev. Stat.) provides as follows:

"SPECIAL RESTRICTIONS ON LAMPS. (a) No person shall drive or move any vehicle or equipment upon any highway with any lamp or device thereon displaying a red light visible from directly in front thereof.

"(b) Flashing lights are prohibited on motor vehicles, except as a means for indicating a right or left turn or stop.

"The provisions of Paragraphs (a) and (b) of this section shall not apply to authorized emergency vehicles or to vehicles of the second division designed for towing or hoisting disabled vehicles while actually being used for such purposes, or to motor vehicles or equipment of contractors while engaged in maintenance or construction operations within the limits of construction projects. As amended by act approved July 15, 1953. L. 1953, p. 1578."

Chapter 11-47 of the Municipal Code provides as follows:

"No person shall falsely assume or pretend to be a policeman or a member of the department of police of this city, or, without being a member of the department of police of this city, wear in public the uniform adopted as the police uniform.

"No person shall counterfeit or imitate, or cause to be counterfeited or imitated, any badge, sign, signal or device adopted by the department of police. Nor shall any person use or wear any badge, sign, signal or device adopted or used by said department of any similar in appearance, without authority so to do from the commissioner of police.

"Any person violating any of the provisions of this section shall be fined not less than ten dollars nor more than one hundred dollars for each offense."

Chapter 193-24 of the Municipal Code provides as follows:

"No person shall, with intent to sell or in anywise dispose of merchandise, securities, service, or anything offered directly or indirectly to the public for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto or any interest therein, make, publish, disseminate, circulate, or place before the public, or cause directly or indirectly to be made, published, disseminated, circulated, or placed before the public, in this city, in any newspaper or other publication sold or offered for sale upon any public way, or other public place, or on any sign upon any public way or other public place, or in any handbill or advertisement posted upon any public way or public place, or on any placard, advertisement, or handbill exhibited or carried in any public way or public place, or on any banner or sign flying across the public way or from any house, an advertisement of any sort regarding merchandise, securities, service, or anything so offered to the public, which advertisement contains any assertion, representation, or statement which is untrue, deceptive, or misleading. Any person violating any provision of this section shall be fined not less than twenty-five dollars nor more than two hundred dollars for each offense."

It is, therefore, our opinion the use of the red Mars light would be in violation of said Chapter 95½, Section 210. We are also of the opinion that any attempt to imitate any badge, sign, signal or device adopted by the Department of Police or an attempt to imitate a policeman would be a violation of Chapter 11-47 of the Municipal Code. Also, any advertisement for services containing any assertion, representation or statement that would give the impression that the escort service is a police escort would be in violation of Chapter 193-24 of the Municipal Code.

CUSTODIAN TO RELEASE PROPERTY IN PROBATE

(No. 12053—Commissioner of Police—A. F. G.—July 2, 1956.)

We are in receipt of a letter from a firm of lawyers dated June 27, 1956, in which they state that they represent the administrator of the estate of Eleanor Alice Walsh, deceased, which estate is being probated in the Probate Court of Cook County. They also state that some property of the deceased is in the custody of the police department in the hands of the Custodian; and that the Custodian refuses to turn over the property to the lawfully appointed administrator without advice from this office as to the propriety of his so doing.

It is the duty of an administrator in Probate to collect all of the assets of the estate and report the same to the Probate Court, and it is the duty of any one having possession of property belonging to an estate to turn the same over to the person appointed by the Probate Court upon showing his proper credentials.

We advise that the police department in this case and in similar cases turn over property belonging to an estate in Probate to the administrator of such estate upon presentation by him of a certified copy of his letters of Administrator.

We are sending a copy of this letter to the law firm.

ACCIDENT REPORTS TO CORPORATION COUNSEL

(No. 12147—Commissioner of Police—C. P. H.—July 24, 1957.)

We have your letter of July 16, 1957 wherein you request our opinion as to whether or not Circular Order No. 362 of your Department, which requires the police to report to the Corporation Counsel all accidents occurring upon the streets, sidewalks, parkways and alleys of the City of Chicago, includes the reporting of accidents occurring as follows:

1. Board of Education of the City of Chicago property including class rooms, gymnasiums and playgrounds.
2. Chicago Transit Authority property.
3. Chicago Park District property, including parks, playgrounds and boulevards.

Circular Order No. 362, referred to in your communication, provides as follows:

“CIRCULAR ORDER NO. 362

November 4th, 1953.

To Commanding Officers:

“All accidents occurring on streets, sidewalks, parkways, alleys, etc., where injury to person or damage to city property is involved, and there exists even a remote possibility of the City being involved in a law suit, must be reported to the Corporation Counsel, through channels, without delay.

“Numerous orders have been issued on this subject in the past covering the form of report to be submitted, *i. e.*, Damage to City Property Report; Statement of injured person (covering condition of injured); condition of street, roadway, alley, etc., lighting conditions, and a statement from witnesses and principals involved.

“Commanding Officers will again call this subject to the attention of all members of their command, with instructions to see to it that provisions of same are carried out.”

(Signed) Timothy J. O'Connor,

Commissioner of Police.

The principal reason for the issuance of the above order, requesting the police to report accidents to this department, is to aid us in the investigation and defense of personal injury and property damage suits filed against the City because of the alleged negligence on the part of the City. The Corporation Counsel by law is charged with the duty, among other things, to appear and protect the rights and interests of the City in all such negligence suits instituted against the City. (Ill. Rev. Stats. 1953, Ch. 24, par. 21-11; Municipal Code of Chicago, section 6-2.)

Under the law the City must keep its streets and other public ways in proper condition for the use of the public, and a neglect to perform that duty resulting in damage to a person exercising due care, will render it liable for damage sustained. The City is also liable for the negligence of its officers or

employees in the exercise of corporate, proprietary, or ministerial functions as distinguished from the exercise of governmental functions (Illinois Law and Practice, Vol. 9, sections 472, 473 and 491). The City is made liable by statute for damages arising out of the negligent operation of Fire Department motor vehicles. Furthermore, the City is required by statute to indemnify any policeman for the amount of any judgment recovered against him for injury to a person resulting from the performance of his duties as a policeman (Ill. Rev. Stats. 1955, Ch. 24, pars. 1-13 and 1-15). It has been held that the City is not immune from tort liability growing out of the negligent operation of its garbage trucks (*Gravander v. City of Chicago*, 399 Ill. 381 (1948)).

Manifestly, the City of Chicago is not responsible for the tortious acts of The Chicago Park District, Transit Authority and the Board of Education of the City of Chicago. These municipalities are organized and exist under and by virtue of special acts of the Legislature, which prescribe their powers and duties. The special acts creating these agencies expressly provide that they may sue and be sued under their respective names (Ill. Rev. Stats. 1955, Ch. 105, par. 333.3; Ch. 111-2/3, par. 305; and Ch. 122, par. 34-2). Each such public body has its own law department, which represents it in all its litigation. This office, therefore, would have no interest in police reports regarding accidents which occur on property under supervision of these municipalities.

In view of the foregoing, it is our opinion that the police under Circular Order No. 362 should report to the Corporation Counsel only those accidents where persons are injured or property damaged on account of defects or obstructions in the streets, sidewalks, parkways, alleys and other City property under the jurisdiction and control of the City of Chicago, all accidents resulting in injuries to persons or damages to property arising out of the operation of police, fire, garbage and other vehicles owned and operated by the City of Chicago, and all accidents causing injuries to persons resulting from acts of policemen in the performance of their duties.

It is our further opinion that the police are not required under the said Circular Order to report to the Corporation Counsel accidents which happen on property maintained and under the jurisdiction and control of the Chicago Park District, the Chicago Transit Authority and the Board of Education of the City of Chicago.

PRIVILEGE FROM ARREST IN GOING TO AND FROM COURT

(No. 12151—Commissioner of Police—M. B.—August 9, 1957.)

We have your memorandum of June 21, 1957 from Philip A. McGuire, Chief of Traffic, in which he requests a transmittal of his inquiry concerning Chapter 13, Section 9 of the Illinois Revised Statutes of 1955, relative to arrest of privileged persons going to and from court and seeks an interpretation of the Statute from the Corporation Counsel's Office.

The section under analysis provides as follows :

"All attorneys and counselors at law, judges, clerks and sheriffs, and all other officers of the several courts within this state, shall be liable to be arrested and held to bail, and shall be subject to the same legal process, and may in all respects be prosecuted and proceeded against in the same courts and in the same manner as other persons: are, any law, usage or custom to the contrary notwithstanding; Provided, nevertheless, said judges, counselors or attorneys, clerks, sheriffs, and other officers of said courts, shall be privileged from arrest while attending courts, and whilst going to and returning from court."

We have made a thorough search of the authorities and it is our opinion that the persons designated by the statute as privileged from arrest can be arrested by a police officer under the same circumstances and treated in the same manner as any other citizen.

There is only one Illinois case bearing directly on the interpretation of this statute, *Wilson v. Nettleton*, 12 Ill. 61, which holds that the statute confers a privilege and therefore is waived if not interposed previous to or at the time of trial.

In support of this, *Corpus Juris Secundum*, Vol. 6, p. 573 states that provisions of privileges from arrest are founded on public policy, having due regard for the proper administration of affairs and are not intended to shield those guilty of criminal offenses; and the arrest of such persons is not void as the exemption is only a personal privilege which the person is entitled to plead in abatement.

In 27 Fed. 342, *Bobbins v. Lincoln*, the court, in interpreting the Illinois statute, held that the privilege applies only from such service of process as involves imprisonment or holding to bail and not to civil or other arrest.

**AN ARRESTING OFFICER IS NOT LIABLE
FOR FALSE IMPRISONMENT
FOR THE ARREST OF A PRIVILEGED PERSON**

Bennett v. Ahrens, 57 Fed. 2nd 948, which is one of the two federal cases passing directly on the interpretation of the Illinois statute, held that the arrest of a person who was exempt from arrest as an attorney returning from court, under the Illinois statutes, will not render the arresting officers liable for false imprisonment notwithstanding the claim that the officers acted maliciously. The court stated, "The fact that appellant was exempt from arrest by virtue of his privilege as an attorney returning from court does not make the officer or officers arresting him liable for false imprisonment. The appellant's only remedy is to apply to the court for his discharge from arrest. The privilege is one which he may exercise or waive. Hence, the arrest under such circumstances is voidable rather than void."

In support of the above, *American Jurisprudence*, Vol. 4, page 72 states that, "Since the exemption from arrest is merely a privilege, it is usually held that in case of its breach the aggrieved party does not have any actions for damage."

The plea of privilege from arrest can be made only before a court and is improperly made to an arresting officer. This statute cannot be used to avoid arrest by a police officer in the proper performance of his duties. He is not in a position to determine whether such privilege does or does not apply in any given instance. The statute does not grant immunity from arrest, but merely a privilege and as such must be asserted at the proper time before the proper court.

If a court sustains the plea of privilege and discharges the defendant, then the police officers should be prepared with a warrant issued upon complaint or information to affect his arrest at the defendant's home or office or wherever else he may be after the completion of his official duties.

Therefore sub-division (a) of your request is answered in the affirmative; sub-divisions (b), (c), (d), (e), and (f) are answered by our opinion that the persons designated by the statute as privileged from arrest can be arrested by a police officer under the same circumstances and treated in the same manner as any other citizen.

FINDERS' RIGHTS IN LOST PROPERTY

(No. 12160—Commissioner of Police—A. G. G.—August 30, 1957.)

In accordance with your request of August 24, 1957, as to disposition of property found in the front yard of Mrs. Casmo Campoli, and which she turned over to the 6th District Station, and now is in the possession of the City Custodian, we submit herewith our opinion as to the law governing "lost property."

By general rule of the common law, one who finds and appropriates a lost chattel acquires the title thereto and the right of possession thereof against all the world except the true owner.

25 Corpus Juris, page 1136.

The right of possession as against all except the true owner is in the owner or occupant of the premises where the property is discovered, since he has custody of the property and owes a duty to the owner as a gratuitous bailee, with respect thereto.

34 American Jurisprudence, page 635:

Our State Statute, Chapter 50, Paragraphs 27 and 28 (Illinois Revised Statutes 1955) governing "lost goods or money" is as follows:

"If any person or persons shall hereafter find any lost goods, money, bank notes, or other choses in action, of any description whatever, it shall be the duty of such person or persons to inform the owner thereof, if known, and to make restitution of the same, without any compensation whatever, except the same shall be voluntarily given on the part of the owner. If the owner be unknown, and if such property found is of the value of \$15 or upwards, the finder or finders shall, within five days after such finding as aforesaid, appear before some justice of the peace of the proper county, and make affidavit of the description thereof, the time and place when and where the same was found, that no alteration has been made in the appearance thereof since the finding of the same, that the owner thereof is unknown to him and that he has not secreted, withheld or disposed of any part thereof. The justice shall enter the value of the property found as near as he can ascertain in his estray book together with the affidavit of the finder, and shall also, within ten days after the proceedings have been entered on his estray book, transmit to the county clerk a certified copy thereof, to be by him recorded in his estray book, and to file the same in his office."

Paragraph 28 provides:

"* * * shall not exceed the sum of \$15 * * *."

If the value thereof exceeds the sum of \$15, the county clerk, within twenty days after receiving the certified copy of the justice's estray record shall cause an advertisement to be set up on the court house door, and in three other of the most public places in the county, and also a notice thereof to be published for three weeks successively in some public newspaper printed in this state and if the owner of such goods, money, bank notes, or other choses in action does not appear and claim the same and pay the finder's charges and expenses within one year after the advertisement thereof as aforesaid, the ownership of such property shall vest in the finder."

Paragraph 29 provides:

"If, in any case provided for by this Section, the finder or taker-up of property has delivered it for safe keeping to any person, firm, association or public or private corporation not the true owner thereof, such safe-keeper shall deliver it to the finder or taker-up upon his demand therefor."

Paragraph 30 provides:

"* * * all costs of proceedings in the matter of an estray or other property taken up or property found, shall be paid by the taker-up or finder in the first instance, and if the owner of the property appears and claims it within the time limited by this Act he shall repay the finder or taker-up the amount of such costs before the finder or taker-up shall be required to surrender the property to such owner."

Paragraphs 34 and 35 of Chapter 50 provides for a penalty for failure to comply with the provisions of said Chapter.

Paragraph 36 provides:

"All functions, powers and duties of a justice of the peace under this Act shall, in the City of Chicago, be performed by the Municipal Court of Chicago."

We are, therefore, of the opinion that as between the right of the custodian to retain the property and the finder Mrs. Casmo Campoli to secure its return, the latter is superior and the property should be returned to her. The finder should be advised as to the law above quoted so that she may proceed accordingly.

SEARCH AND SEIZURE

(No. 12221—Mayor—R. J. C. - J. M. - S. R. D.—April 30, 1958.)

You have forwarded for our consideration, the letter from the Honorable Benjamin S. Adamowski, State's Attorney of Cook County, Illinois, dated April 22, 1958. The letter presents the following legal question:

1. A discussion of the law of search and seizures.
2. Whether the possession of a federal gambling stamp by a liquor licensee is sufficient ground for the Local Liquor Commissioner to revoke the license.

It is not our purpose or desire to engage in judicial debate. However, it is our duty to hew a clear legal course for you and the Police Department to follow relative to the above listed problems. In doing so, it may be necessary for us to reach legal conclusions contrary to those of Mr. Adamowski.

It should be noted that the constitutional provision is limited to "unreasonable searches and seizures" (Ill. Rev. Stat., 1957, p. 9, Article II, Section 6).

What is an unreasonable search and seizure, or rather what is a reasonable search and seizure, has been the subject of definition by both the legislature and the judiciary. Section 4 of Division VI of the Criminal Code (Ill. Rev. Stat., 1957, chap. 38, par. 657) provides as follows:

"An arrest may be made by an officer or by a private person without warrant, for a criminal offense committed or attempted in his pres-

ence, and by an officer, when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it."

The question of when an arrest without a warrant is legal, and, therefore, sustain a search and seizure without a search warrant, has been before the Supreme Court of Illinois on numerous occasions. The latest expression of the court on the subject is found in the case of *The People v. Boozer* (1957), 12 Ill. 2d 184, where the court said (pp. 187-188) :

"A peace officer has the right to arrest without a warrant, for a crime not committed in his presence, when a criminal offense has in fact been committed and he has reasonable grounds for believing that the person to be arrested committed it (Ill. Rev. Stat. 1955, chap. 38, par. 657; *People v. Kalpak*, 10 Ill. 2d 411). To justify such an arrest, the ground for the belief that an offense had been committed and that the person arrested had committed it, must be such as would influence the conduct of a prudent and cautious man under the circumstances (*People v. Galloway*, 7 Ill. 2d 527, 534; *People v. McGurn*, 341 Ill. 632, 635, 636). Where the arrest is justified, the accompanying search without a search warrant is also justified, and evidence taken from the person as a result of that search, if otherwise competent and relevant, is admissible against him (*People v. Kalpak*, 10 Ill. 2d 411, 426; *People v. Clark*, 9 Ill. 2d 400, 404, 405). The right of search incident to a lawful arrest has been held to extend to the surrounding premises under the possession and control of the defendant (*United States v. Rabinowitz*, 339 U. S. 56, 61, 94 L. ed. 653, 658; *Agnello v. United States*, 269 U. S. 20, 30, 70 L. ed. 145, 148; *Carroll v. United States*, 267 U. S. 132, 158, 69 L. ed. 543; *People v. Heidman*, ... Ill. 2d ...;) including a public business room (*United States v. Rabinowitz*, 339 U. S. 56, 94 L. ed. 653), the home or dwelling (*Agnello v. United States*, 269 U. S. 20, 70 L. ed. 145; *People v. McGowan*, 415 Ill. 375), and the vehicle of the person arrested (*People v. Tillman*, 1 Ill. 2d 525; *People v. Tabet*, 402 Ill. 93), provided that the search is made at the time of the arrest (*Johnson v. United States*, 333 U. S. 10, 92 L. ed. 436; *Agnello v. United States*, 269 U. S. 20, 70 L. ed. 145; *People v. Kalpak*, 10 Ill. 2d 411). In this case the only question raised is the legality of defendant's arrest. Assuming that the arrest was lawful the defendant does not question the right of the officers to search him or his home in his presence."

In *The People v. Clark* (1956), 9 Ill. 2d 400, the court held that a violation of a municipal parking ordinance constituted a legal arrest and, therefore, the accompanying search without a warrant was justified, saying (pp. 403-404) :

"If the defendant in fact violated a municipal parking ordinance in the presence of the officers they had the right to arrest him without a warrant for that offense. The guaranty of section 6 of article II of our constitution is not against all searches and seizures but only against unreasonable search and seizure, and does not extend to immunity from search upon lawful arrest (*People v. Barg*, 384 Ill. 172). Where the arrest is justified, for whatever cause, the accompanying search is also justified (*People v. Tabet*, 402 Ill. 93). So in this case a search incident to an arrest for a parking violation would be justified. The fact that the property was taken without the necessity of a search cannot make its seizure unlawful if it could have been lawfully seized upon search. We cannot agree that the evidence fails to show an arrest for unlawful parking. No formal declaration of an arrest on that charge had been made by the officers, but none was necessary. The evidence clearly shows that the violation had been called to the attention of defendant; that he voluntarily submitted to the control of the arresting parties; and that the officers intended to effect the arrest and that the defendant so understood them. The elements of a valid arrest were present (4 Am. Jur. Arrest, pages 5 and 6; 6 C. J. S. 571). It is im-

material whether or not defendant was ever formally charged with the traffic violation, or whether or not that charge was sustained. *People v. Edge*, 406 Ill. 490."

At times it is extremely difficult to determine if the arrest without a warrant is reasonable. In *The People v. Tillman* (1954), 1 Ill. 2d 525, the court said (p. 530):

"The constitutional guaranties invoked are a protection against unreasonable searches and seizures. If an officer has reasonable ground for believing a person is implicated in a criminal offense, he has a right to arrest and search without a warrant. There is no formula for a determination of what is reasonable. The constantly recurring problem in this field must separately find resolution in the facts and circumstances of each case."

The courts of this State have passed upon the question of the suppression of evidence involving the seizure of gambling devices without a search warrant. The courts have sustained the action of the law enforcing officers. *City of Chicago v. Sayer* (1946), 330 Ill. App. 181; *People v. Cattaneo* (1954), 2 Ill. App. 2d 429.

There may be instances where individual members of the Police Department, in their zeal to stamp out crime in the City of Chicago and thereby further your goal of making the City a better place to live, step over the narrow line of judicial determination and perform an unreasonable search and seizure. In these instances, the police officers usually attempt to use the seized property as justification of an illegal arrest. This is clearly contrary to the Illinois constitution and should not be tolerated.

It is our opinion that if the arrest is justified, the accompanying search without a warrant is also justified, and evidence taken from the person as a result of that search, if otherwise competent and relevant, is admissible against him. On the contrary, if the arrest is not justified or legal, the accompanying search without a search warrant is illegal and unconstitutional. In the latter circumstances, the Police Department should secure a search warrant in accordance with the constitutional provision.

Mr. Adamowski contends that the Mayor of the City of Chicago, in his capacity as Local Liquor Control Commissioner, has authority to revoke a liquor license if the licensee has paid the Federal Wagering Tax.

The Federal Internal Revenue Code imposing "Taxes on Wagering" (28 USCA 4401-4423) has been sustained as constitutional in *United States v. Kahriger* (1953), 345 U. S. 22. The court rejected an attack on its validity on the ground that it denied the privilege against self-incrimination. The court pointed out that the privilege against self-incrimination related only to past acts and not to "future acts that may or may not be committed" (p. 32). The court said that, in paying the tax and registering, the applicant merely qualified to "engage in the business of wagering in the future" (pp. 32, 33). This language was relied upon in the State of Florida to reverse an order restraining the operation of a lottery and bookmaking business as a nuisance. *Boynton v. State* (1954), 75 So. 2d, 211. The court there relied upon the doctrine laid down by the United States Supreme Court in the *Kahriger* case (p. 215) and concluded (p. 216):

"* * * I do not think the State can ground its case on the mere fact that defendants have purchased a gambling stamp and paid the excise tax shown. * * *"

Later decisions in other jurisdictions, however, question the correctness of the finding in the *Boynton* case. For example, in *State v. Mills* (1956), 86 So. 2d (La.) 895, a gambling prosecution was sustained although objection was made to the reception in evidence of the Federal Gambling Stamp and records. The Louisiana court there relied upon *Irvine v. Cali-*

fornia (1954), 347 U. S. 128, and *Lewis v. United States* (1955), 348 U. S. 419, in distinguishing the *Boynton* case.

In *Deitch v. City of Chattanooga* (1953), 195 Tenn. 245, 258 S. W. 2d 776, a city ordinance was sustained as constitutional. The ordinance prohibited possession of a federal gambling stamp. In a later Tennessee case, *Acklen v. State* (1954), 267 S. W. 2d 101, the court said (pp. 103, 104):

"What this Court long ago said above in reference to a Federal Liquor License obviously and of course is equally applicable to the possession of Federal Wagering Stamps. * * * common sense dictates that these parties would not have gone to the trouble and expense complying with this Federal law unless they fully intended to engage in the activity of which the tax was levied and paid."

Possession of a Federal Liquor Dealer's License is somewhat similar to possession of a Wagering Stamp. Oklahoma prohibits transportation of intoxicating liquor and has a statute which makes possession of a Federal Liquor License prima facie evidence of an intention to violate state laws. Actually, the statute merely says that payment of the tax required of liquor dealers by the United States constitutes prima facie evidence of an intent to violate the law. This law was sustained in *Hattensty v. State* (1958), 321 P. 2d (Okla.) 710.

An Alabama statute making possession of a Federal Wagering Stamp prima facie evidence of a violation of gambling laws has been sustained. *Griggs v. State* (1954), 73 So. 2d 382; 52 Mich. Law Rev. 1082.

Neither the State of Illinois nor the City of Chicago have a statute or ordinance making possession of a Federal Wagering Stamp prima facie evidence of the violation of the gambling laws. In the absence of such a statute or ordinance it is necessary to resort to the statutory power of the Local Liquor Control Commissioner. Our courts have held that the only powers municipalities have to control the retail liquor business are conferred by the Liquor Control Act. *City of Fairfield v. Pappas* (1935), 362 Ill. 80; *Walgreen Co. v. Lenane* (1936), 363 Ill. 628; *Walgreen Co. v. Garland* (1942), 316 Ill. App. 635.

Section 5 of Article VII of the Liquor Control Act (Ill. Rev. Stat. ch. 43, par. 149) provides, in part, that "the local liquor control commissioner may revoke or suspend any license issued by him if he determines that the licensee has violated any of the provisions of this Act or of any valid ordinance * * * or any applicable rule or regulation established by the local liquor control commissioner or the State Commission that is not consistent with the law". The word "determine" denotes finality that the licensee had violated a provision of the Liquor Control Act or a city ordinance or rule or regulation of the Local Liquor Control Commissioner or the State Commission. As there is no statute or ordinance making the possession of a Federal Wagering Stamp an illegal act, the licensee could not have violated any Act or ordinance or resolution which would justify a revocation of his liquor license. Under such circumstances possession of a Federal Wagering Stamp has no application to the question of whether a liquor license should or should not be revoked.

Furthermore, the word "determine" denotes a final decision that the licensee has violated the Act, ordinance or resolution. *New Nat. Coal v. Industrial Commission* (1940), 373 Ill. 468, 471. Such a determination is repugnant to the assertion that the possession of a Federal Wagering Stamp is prima facie evidence of a violation of the gambling laws. Prima facie means first,—that is, as it first appears. *Morrison v. Flowers* (1923), 308 Ill. 189, 195. It does not bring a matter to a conclusion.

Our reasoning finds support in the law. In *Rodriguez v. Culbreath* (1953), 66 So. 2d (Fla.) 58, a charge of being a "common gambler" resulted in conviction and a fine. The only evidence presented was that defendant had

applied for and secured a Federal Occupational Tax Wagering Stamp. In reversing the conviction, the court held (p. 59) :

"* * * we do not think the mere fact that one holds such a stamp would be sufficient, standing alone, to convict him of being a common gambler or vagrant. I think he must be charged with and convicted of the act."

In *Jefferson v. Sweat* (1954), 76 So. 2d (Fla.) 494, another proceeding was instituted against one charging him with being a common gambler. The Florida court reiterated its position in the Rodriguez case saying (p. 499) :

"If it be true that the Gambling Stamp Act * * * attempts to make the possession of a gambling stamp prima facie evidence of the violation of the gambling laws of the state by the possessor of the stamp, then there must first be some evidence that there has been a violation of the gambling laws. The mere possession of the stamp cannot be prima facie evidence that the appellant has been guilty of a crime when there is no evidence of any kind that a crime has been committed. It is well established that the basis of presumption must be a fact and that one presumption cannot be the basis of another presumption."

In 1953, Assistant Corporation Counsel Al F. Gorman rendered an opinion to the effect that a proposed ordinance making it illegal to purchase or possess a Federal Gambling Stamp might not be constitutional (23 Opinions of Corporation Counsel, 374).

In 1951, L. Louis Karton, former Head of the Appeals Division in the office of the Corporation Counsel and, subsequently, Head of the Appeals Division of the State's Attorney's office under Benjamin S. Adamowski, rendered an opinion to the effect that the mere possession of a Federal Wagering Stamp without any overt act indicating that gambling was actually being conducted on the premises does not constitute grounds for revocation of a retail liquor license (23 Opinions of Corporation Counsel, p. 434).

A revocation of a liquor license is subject to judicial review under the Administrative Review Act (Ill. Rev. Stat., 1957, ch. 43, par. 154 A). In our opinion the revocation of a liquor license on the sole ground that the licensee possess a Federal Wagering Stamp would be arbitrary and capricious, subject to judicial reversal.

In view of the divergence of opinions as appears from the foregoing citations and also, in view of the letter from the State's Attorney, not only to the City of Chicago but to other municipalities and villages within the county, it probably would be judicious to put a stop order on the issuance of tavern licenses for the period from May 1, 1958 to November, 1958 on all applicants whose names appear on the list that the State's Attorney gave in his letter of April 1, 1958.

"BARRATRY"

(No. 12228—Commissioner of Police—J. A. C.—May 27, 1958.)

In reply to your recent inquiry regarding editorials in the New Crusader, as to whether or not these editorials come within the purview of Chapter 38, Paragraph 65 of the Illinois Revised Statutes.

"65. Barratry.) Section 26. If any person shall wickedly and willfully excite and stir up any suits or quarrels between the people of this state, either at law or otherwise, with a view to promote strife and contention, he shall be deemed guilty of common barratry, and shall be fined not exceeding \$100; and if he be an attorney or counselor at law, he shall be suspended from the practice of his profession, for any time not exceeding six months."

In the matter of *Gunnels v. Atlanta Bar Association*, 1940, 191 Ga. 366, 12 S. E. 2d 602.

The Atlanta Bar Association published articles and statements to the effect that they would institute suits without charge for recovery of usurious interest paid to persons who had purchased promissory notes and wage assignments that were executed with usurious rates. An injunction was denied and the court held that it was not barratry but that the Atlanta Bar Association had acted properly in protecting the citizenry from such distasteful practices.

In *Commissioners v. M'Cullock* 1818, 15 Mass. 227, the court stated:

"without an intent or malicious design to oppress and harass another by exciting and stirring up suits, there can be no barratry."

The Supreme Court of the United States in *McCloskey v. Tobin*, 252 U. S. 107, 64 L. Ed. 481, used this expression in defining barratry, where there is an habitual stirring up of quarrels and suits the offense amounts to what is called barratry. An early authority defines a barrator to be a common mover and exciter, or maintainer of suits, either in courts or elsewhere in the country.

Based upon our statute and the decisions of the courts, it is our opinion the acts of the staff of the New Crusader did not violate the statute and said editorials did not come within the scope of the act.

POLICE RESIDENCE REQUIREMENTS

(No. 12251—*Park Policemen's Club*—J. C. M.—September 30, 1958.)

In reply to your letter of September 8, 1958 relating to the question of whether the park policemen who will become a part of the Chicago Police Department on and after January 1, 1959 will be required to be residents of the City of Chicago, be advised that Section 25-30 of the Municipal Code of Chicago provides as follows:

"All officers and employees in the classified civil service of the City shall be actual residents of the City. Any officer or employee in the classified civil service of the City who shall fail to comply with the provisions of this Section shall be discharged from the service of the City in the manner provided by law".

When the policemen of the Chicago Park District are transferred to the City of Chicago, they will automatically be under the civil service laws of the City of Chicago, and, therefore, the foregoing section of the Code will apply. Since the provision of the Code is enforced against the present members of the Chicago Police Department, it may be assumed that a like enforcement of the Code provision will apply to all policemen so transferred.

POLICE MARINE JURISDICTION

(No. 12277—*Commissioner of Police*—E. W. P.—April 21, 1959.)

We have your letter of February 26, 1959, in which you make the following inquiry:

"With the effecting on January 1st, 1959, of the consolidation of the Chicago Park District Police with the Chicago Police Department, questions have arisen over the policing powers of this department

over the water areas of Lake Michigan, the Chicago River and the Illinois Sanitary Ship Canal.

What laws and ordinances are to be invoked in our policing of these areas?

What is the limit of our territorial jurisdiction in the waters of Lake Michigan? What are our areas of patrol?

What part of the Illinois Sanitary and Ship Canal are under the jurisdiction of this Department?

With reference to existing Park District ordinances regulating harbors, beaches, etc., what is our course of action to be in the enforcement of same?"

The jurisdiction over the water areas of Lake Michigan, the Chicago River and the Illinois Sanitary and Ship Canal is lodged with the Harbor Master. Section 38-1 of the Municipal Code provides as follows:

"The harbor shall consist of the Chicago River and its branches to their respective sources and all slips adjacent to and connecting therewith, the Ogden Canal, the Calumet River and its branches and all slips connecting therewith, the waters of Lake Calumet and all slips and basins connected therewith and all piers, breakwaters, and permanent structures therein, the *Drainage canal* and all piers and basins, and the waters of Lake Michigan, including all breakwaters, piers and permanent structures therein, *for a distance of three miles from the shore* between the north and south lines of the city extended, to the extent that the above-named waterways are within the territorial limits of the city. The harbor as herein defined shall be subject to the control of the harbor master under the direction of the commissioner of public works, and the use thereof shall be governed by this code" (Italics supplied).

Section 38-4 provides:

"* * * Harbor District No. 1 shall include all of the Chicago River, including the main stream from its mouth to the forks, and the north branch and the south branch to the city limits * * *."

Therefore, with reference to your first three questions, these areas are subject to the control of the Harbor Master under the direction of the Commissioner of Public Works.

Section 8-48 defining the police powers of the Harbor Master and his assistants provides:

"The harbor master and the assistant harbor masters shall be sworn in as special policemen by the commissioner of police, for the purpose of carrying into effect the police regulations of the city concerning the harbor under their charge and to preserve the public peace and quiet in and about the harbor, and for such purposes shall have all the power and authority of police officers under the laws of the state and the provisions of this code."

However, due to the continuous expansion of Lake Calumet and the other facilities under the control of the Harbor Master, subject to the direction of the Commissioner of Public Works, it is our opinion that upon requests through these channels, the Commissioner of Police should furnish the necessary police patrol and protection.

Relative to your inquiry as to your course of action in the enforcement of existing Park District ordinances regulating harbors, beaches, etc., paragraph 333.51-333.70 of Chapter 105 of the Illinois Revised Statutes provides as follows:

"The City assumes responsibility for the supervision, maintenance and repair of such boulevards and boulevard appurtenances, and for their

policing and traffic regulation and control. The City may from time to time establish regulation for the government of said boulevards; may exclude all objectionable traffic and travel and may make and enforce reasonable traffic and other regulations, and provide penalties not exceeding \$200.00 for any one offense for the violation of such rules and regulations.

"The City has the same powers over the boulevards so transferred as it exercises over boulevards and streets under its jurisdiction of providing police personnel for the parks and park district."

The City, therefore, has acquired the jurisdiction and power to invoke the Statute and its own Ordinances under the newly acquired police jurisdiction and of course, retains the same jurisdiction as far as policing is concerned over the parks, bathing, bath houses, play grounds, etc., which has been transferred by the City of Chicago to the Chicago Park District for maintenance, management, supervision and operation.

POLICE BOARD MEMBERS—RESIDENCE REQUIREMENTS

(No. 12324—City Council—J. C. M.—March 3, 1960.)

A number of members of your august body have raised the question of the qualifications of two of the five members appointed to the Police Board by reason of the fact that they are non-residents of the City of Chicago, and request an opinion thereon.

Under Chapter 24, Section 9-87 of the Illinois Revised Statutes, it is provided (*inter alia*):

"No person shall be eligible to any municipal office unless he is a qualified elector of the municipality and has resided therein at least one year next preceding his election or appointment. *However, in municipalities with less than 200,000 population according to the last preceding Federal or State census, these requirements shall not apply to the municipal engineer, health officers, or other officers who require technical training or knowledge*".

Under Section 22 of Article IV of the Constitution of Illinois, it is provided that the General Assembly shall not pass local or special laws where a general law can be made applicable.

By a long line of decisions, the rule has been established that legislation which classifies municipalities upon the basis of population violates the constitutional provision against special legislation unless the classification bears a reasonable relation to the objective which the legislation seeks to accomplish.

In considering the application of this statute and the discrimination between municipalities having a population of less than 200,000 and those having a population of over 200,000, we must consider whether there is something, in the nature of things, which in some reasonable degree accounts for the division into classes. If there is no reasonable relation between the classification of municipalities and the purposes and objects to be attained, the legislation is arbitrary and makes an unnatural classification of municipalities where municipalities exercise the same general powers and are charged with similar duties in other respects. It will be noted that cities of the population under 200,000 can engage officers who have technical training or knowledge and who are not qualified electors and who

do not reside within the limits of the municipality. A reading of the statute does not indicate any special objects to be accomplished by virtue of the differential classification and under the decided cases, there must be some objective other than population for the legislative discrimination.

It is a matter of general knowledge that many situations can and do arise within the City of Chicago where it is to the advantage of the municipality to engage persons who are not electors and do not reside within the city and who have special skill or knowledge to perform particular services for the city. Special talent and knowledge have no geographical confines. In the Act in question, the legislature recognizes that a person having technical skill or knowledge should not be denied eligibility to a municipal office by reason of not being a qualified elector or resident of the municipality.

In *Giebelhausen v. Daley*, 407 Ill. 25, the court said at page 37:

"The principle applicable to a proper classification of persons subject to a law must rest on some difference which has a reasonable and just relation to the act in respect to which the classification is proposed. The situation calling for the law must exist and not be created by the legislation making the classification."

In *Hunt v. County of Cook*, 398 Ill. 412, the court was called upon to determine the constitutionality of the Domestic Relations Act which provided for a divorce division in aid of powers, functions and duties of the judges of each "judicial circuit having more than 500,000 population as determined by the last Federal census". The court there held that while dense populations of cities and congested areas create social problems differing from those of a rural area, the incidents of divorce and separation of married persons and parents and those attendant social instabilities and possible dependency and delinquency are largely the same throughout the State and held the Act unconstitutional.

The object and purpose in engaging persons of great skill and knowledge to perform specific services for a municipality are the same in a community of 200,000 or less population as in a community of over 200,000 population. There is no apparent reason set forth in the statute that can justify the discrimination, and the section, as to appointed officers, in our opinion, is invalid in that it violates the constitutional provision.

It is also our opinion that it is for the Mayor and the City Council to determine whether or not the appointees have special skill or knowledge to perform the duties prescribed by the ordinance.

We recognize that in the case of *Gacca v. City of Chicago*, 411 Ill. 146, the Supreme Court did sustain a statute using population as a differentiating factor, which statute provided that the municipality indemnify a policeman for any judgment recovered against him as a result of such injury except where the injury results from wilful misconduct of the policeman, where such injury arises out of the performance of his duties. However, in the *Gacca* case, the Supreme Court enumerates three distinguishing factors as justifying the classification:—(1) heavier and more congested traffic in Chicago, (2) the relatively wide acquaintance of policemen in a small town and the resulting diminished likelihood of false arrest due to the mistaken identification, and (3) a generalized group of social conditions which are said to exist in Chicago but not elsewhere in the State.

In our opinion, such factors for classification by population are not present in Section 9-87 cited above, and therefore the 200,000 population restriction is invalid and unenforceable.

If the Mayor, in making the appointments, and the City Council, in consenting thereto, are of the opinion that the persons appointed possess technical training or knowledge, such appointments are valid.

As to the other questions raised, be advised that the Chicago Park District Act and the Conservation of Urban Residential Areas Act contain no restrictions as to members of the Boards holding other offices. The only restriction in the Cities and Villages Act relating thereto is contained in Section 9-13 which restricts certain elected officials from holding any other office.

The amendments to Chapter 11 of the Municipal Code of Chicago, as passed by the City Council on March 2, 1960, are constitutional in our opinion.

POLICE ACTIVITY OUT OF CITY LIMITS

(No. 12327—*Superintendent of Police—C. P. H.—March 28, 1960.*)

We have your letter of March 11, 1960 wherein you state that municipalities adjacent to the City of Chicago make requests for the services of the Chicago Police Department in assisting in criminal investigations and other types of police services. You request our opinion on the following legal questions:

1. Is the Superintendent of Police vested with authority to dispatch police personnel to these municipalities for the purposes indicated?
2. In cases where policemen, while performing police duty within an adjacent municipality, or when traveling to or from the city to such a municipality, suffer sickness, injury, or death, are such policemen fully protected in their rights and do they continue to come within the provisions of the following laws:
 - (a) Sections 11-44 and 11-45 of the Municipal Code of Chicago, as amended March 2, 1960, which provide for the payment of full salary for designated periods to any member of the Police Department receiving injury or becoming disabled in the discharge of his duties.
 - (b) Paragraph 869a of ch. 24, Ill. Rev. Stat. 1959, and Sections 22-1 to 22-22 of the Municipal Code of Chicago, which provide for payments to the families or dependents of policemen killed or fatally injured in the performance of their duties, and authorizing medical care and hospital treatment of policemen in case of accident.
 - (c) Sections 945 to 1007 of ch. 24, Ill. Rev. Stat. 1959, which authorize the payment of duty disability pensions to policemen who become disabled as a result of injury incurred in the performance of any act of duty.
3. Is the City of Chicago, under the provisions of par. 1-15 of ch. 24, Ill. Rev. Stat. 1959, and Section 6-2 of the Municipal Code of Chicago, under a duty to indemnify policemen for judgments recovered against them as the result of injury to the person or property of another while engaged in the performance of duties as policemen, while within an adjacent municipality or when traveling to or from the city to such municipality, except where the injury results from the wilful misconduct of the policemen?

The Chicago Police Department is authorized by law to perform police service in adjacent municipalities. Section 8-5 of Article 8, Revised Cities and Villages Act, provides that the territory which is embraced within the corporate limits of adjoining municipalities within any County in this State shall be a Police District. Section 8-6 of Article 8 provides that the police of any municipality in such district may go into any part of the

district to suppress a riot, to preserve the peace, and to protect the lives, rights, and property of citizens. This latter section further provides that for these purposes the Mayor or President of any municipality in the district, and the Chiefs of Police therein, shall use the police forces under their control anywhere in the district (Ill. Rev. Stat. 1959, ch. 24, pars. 8-5 and 8-6). It has been held that the police of the City of Berwyn had the duty and the authority, under this statute, to pursue a suspected criminal through the villages of Forest Park, Oak Park and Maywood. *Taylor v. City of Berwyn*, 297 Ill. App. 417, affirmed 372 Ill. 124.

Consideration must now be given to the question of who in the Chicago Police Department has authority, under the above provisions of the statute, to order police into adjacent municipalities. Under Sections 1-2, 23-1, 23-78 and 23-105, Revised Cities and Villages Act (Ill. Rev. Stat. 1959, ch. 24, pars. 1-2, 23-1, 23-78 and 23-105), the City Council is empowered to adopt ordinances "to prescribe the duties and powers of all police officers" and "to pass and enforce all necessary police ordinances." The city may derive its power to legislate upon a given subject from one or more grants of power. *Consumers Co. v. City of Chicago*, 313 Ill. 408; *Goodrich v. Busse*, 247 Ill. 366; *Spiegler v. City of Chicago*, 216 Ill. 114; *Gundling v. City of Chicago*, 176 Ill. 340; *Potson v. City of Chicago*, 304 Ill. 222; Op. Corp. Coun. Vol. 23, pp. 565, 566. Pursuant to this statutory authority the City Council recently amended Sections 11-1 to 11-47 of the Municipal Code of Chicago, which organized and established the Department of Police (Coun. J., March 2, 1960, pp. 2059 to 2063). Section 11-2 created a Police Board consisting of five members. Section 11-3 provides that the Board shall have power to supervise and control the Department, to make and enforce all necessary and desirable rules and regulations therefor, and to direct the Superintendent of Police in the management of the Department. Section 11-6 provides:

"Subject to the rules of the department and the instructions of the Board, said Superintendent shall have the power and duty: (1) to administer the affairs of the department as its chief administrative officer; * * * (Italics ours.)

The issuance of an order authorizing personnel of the Chicago Police Department to go into adjacent municipalities to perform police service, in conformity with the police district statute referred to herein, is manifestly an administrative act. Under Section 11-6 of the Code, the Superintendent of Police has power to administer the affairs of the department as its chief administrative officer. It is clear that he has the authority to issue an order authorizing and directing police personnel into adjacent municipalities to assist in law enforcement.

We have examined the provisions of the statutes and of the code cited in Question 2, which authorize payments of salary to policemen that are disabled; payments to families or dependents of policemen killed or injured; payments of medical and hospital treatment of injured policemen; and payments of disability pension to policemen. The payments authorized in these provisions of the statutes and code are made when policemen suffer sickness, injury or death in the performance of their duties as members of the Police Department of the City of Chicago. When policemen are assigned to adjacent municipalities to perform police service, they continue to be under the direction, supervision, management and control of the Department of Police of the City of Chicago, and all of their acts in connection with such assignment, whether in the city or an adjacent municipality, are in the performance of their duties as policemen of the City of Chicago. Therefore, all such payments would be made when policemen suffer sickness, injury or death while performing duties as policemen of the City of Chicago on assignment to adjacent municipalities.

We have also reviewed the provisions of the statute referred to in Question 3, which provide for the indemnification of policemen for judgments entered against them in cases specified therein. These provisions of the

statute indemnify policemen for judgments entered against them as the result of injury to person or property while in the performance of their duties as policemen. As heretofore stated, when members of the Chicago Police Department are assigned to adjacent municipalities to perform police service, they are performing such service as members of the Chicago Police Department. The City of Chicago, therefore, would indemnify such policemen for any judgments entered against them for injuries or damages while performing their duties in connection with such assignment, except where the injury results from the wilful misconduct of the policemen.

In answer to Question 1 it is our opinion that the Superintendent of Police is vested with power to dispatch police personnel to adjacent municipalities to assist in law enforcement activities.

In answer to Question 2 it is our opinion that police personnel of the Chicago Police Department ordered into adjacent municipalities, who suffer sickness, injury or death while performing police duties therein or when traveling to or from the City of Chicago and such municipality, would be fully protected in their rights under the provisions of the statutes and the code cited in Question 2, authorizing payments of full salary to policemen disabled in the discharge of their duties; authorizing payments to families or dependents of such policemen killed or fatally injured; authorizing medical care and hospital treatment in cases of accidents to such policemen; and authorizing disability pensions to policemen when they become disabled in the performance of their duties.

In answer to Question 3 it is our opinion that the City of Chicago, under the indemnification act referred to herein, would be under a duty to indemnify any police officer of the City of Chicago for any judgments recovered against them as the result of injury to the person or property of another while in the performance of duties as policemen, while within an adjacent municipality or when traveling to or from the city to such municipality, except where the injury results from the wilful misconduct of the policemen.

SECONDARY EMPLOYMENT

(No. 12338—Aide to Superintendent of Police—J. C. M.—May 5, 1960.)

With your letter of April 22, 1960 you enclose copy of a proposed revision of Rule 284 relating to other occupations of police personnel.

We suggest that this proposed revision be revised to read as follows:

- "1. In order to allow secondary jobs for members or employees of the police department it is recommended that Rule 284 be revised to read as follows:

" 'A member or employee of the department is prohibited from engaging in any occupation, profession or business other than his official capacity as a member or employee of the police department except with the official written permission of the Superintendent of Police. Such other occupation, profession or business shall be such that it shall not be in conflict with his police duties and shall be within the limits of the City of Chicago.' "

It would appear to us that a policeman should not be permitted to operate in any manner as owner or employee of a tavern and as owner or employee in the operation of a taxicab. There may be other positions that should not be available, which may be discussed at the next Board meeting.

We see no objection to the liability waiver.

However, some provision should be made in the Rule providing that a police officer while performing outside work is not on duty as a policeman. We mention this because we recall that there is a Rule which provides that police officers are on duty twenty-four hours a day. The Supreme Court has held that police officers are on duty only during the fixed hours of an assignment and the Rule refers to emergency matters only. The language of the Rule should be clarified.

PRESS PHOTO OF JUVENILE PRISONER

(No. 12344—*Superintendent of Police—A. F. G.—June 8, 1960.*)

In your letter of April 7, 1960 you ask our opinion as to:

“whether Illinois statutes or court decisions require that police withhold from the press or other news media, or from the public, the names and other particulars concerning juveniles who commit crimes and whether the police are required by law to prevent press photographers, or news-reel or T. V. cameramen from taking pictures of a juvenile offender while in police custody.”

We have examined the Illinois statutes and find no specific statute which requires you to permit, or prohibits you from permitting the photographing of juvenile offenders held in your custody. However, the policy of the State with reference to the protection of youthful offenders, seems clearly to be set out in the “Family Court Act,” Chapter 23, paragraph 2001, Illinois Revised Statute, 1959. This paragraph reads in part as follows:

“A disposition of any child under this Act or any evidence given in such cause, shall not, in any civil, criminal or other cause or proceeding whatever in any court, be lawful or proper evidence against such child for any purpose whatever, except in subsequent cases against the same child under this Act, and no adjudication under the provisions of this Act, shall operate as a disqualification of any child subsequently to hold public office or as a forfeiture of any right or privilege or to receive any license granted by public authority; and no child shall be denominated a criminal by reason of such adjudication, nor shall such adjudication be denominated a conviction.

Neither the fact that a child has been before the children's court for hearing, nor any confession, admission or statement made by him to the court or to any officer thereof while a male under the age of 17 or while a female under the age of 18, shall ever be admissible as evidence against him or his interests in any other court or proceedings.

This Act shall be construed to the end that the care, custody and discipline of the children brought before the court shall approximate as nearly as possible that which they should receive from their parents, and that as far as practicable they shall be treated not as criminals but as children in need of aid, encouragement and guidance.”

The courts of this and other states are in agreement with the humane policy set out in the Act above referred to. In one case our Supreme Court seemed to indicate that juveniles in police custody should be treated as follows:

“The purpose of the Juvenile Court Act (now known as the Family Court Act) which has been held constitutional by our Supreme Court, was for the treatment of children as wards of the State to be protected rather than as criminals to be punished.” (*Lindsay v. Lindsay*, 257 Ill. 328.)

Similarly our Appellate Court had this to say:

"Proceedings in the Family Court are informal and pleadings are purposely vague and informal in order to carry out the intention of the Act calculated to protect children from the consequences attendant upon setting out specific misconduct for any record available to the public." (*People v. Mahnke*, 270 Ill. App. 611.)

The purpose of a statute such as the Family Court Act is very excellently covered by the Arizona Supreme Court in *State v. Guerrero*, 120 P. (2d) 798, where the court said:

"There is no question but that this salutary statute is for the purpose of protecting a child when it becomes a ward of the State. Its aim is to 'hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past.' It prohibits the use of juvenile court proceedings or evidence obtained therein against a child in any other court to discredit him as one possessing a criminal history."

In view of the clearly expressed policy of the Family Court Act, which policy of protecting juvenile offenders from the consequences of their offenses, has been affirmed by the courts, we are of the opinion you should not permit the taking of pictures of youthful offenders in your custody.

C. BOARD OF HEALTH

SINGLE SERVICE VAPORIZERS

(No. 11802—President, Board of Health—M. I. W.—April 20, 1954.)

We have your letter of April 6, 1954, in which you request our opinion as to whether a resolution passed by the Board of Health on April 6, 1954, governing the distribution and use of "single-service vaporizers and/or fumigating devices is drawn in a legal manner."

The resolution recites a warning against improper installation and unsafe use of such devices published in the Journal of the American Medical Association as well as a report of specific instances of poisoning resulting from exposure to fumes from such units printed in another issue of the same publication. Reference is also made to an earlier resolution of the board of health governing use of continuously operating units used commercially and to a recent recommendation by the United States Public Health Service that the public should be cautioned about dangers inherent in general household application.

The resolution then points to section 9-13 of the Municipal Code of Chicago which reads as follows:

"The board of health shall have power to make such rules and regulations, as it may deem necessary or advisable, in relation to the sanitary condition of the city and for the prevention and suppression of disease, not inconsistent with the provisions of this code. Such rules or regulations shall take effect and be in force ten days after publication in a daily newspaper of the city, except in cases of emergency as herein-after provided."

The substance of the resolution is to require application to the Board of Health for approval of single-service vaporizer and fumigating devices dispensing chlorinated hydro-carbons prior to sale thereof; to require registration with the Department of Agriculture and that all claims for effective use be similar to those allowed by that Department; and to further require labeling on all containers containing full directions as to use and warnings as to possible dangers.

In an opinion dated November 20, 1939 addressed to the Board of Health, we considered the ever recurring problem of validity of rules and regulations adopted by the Board. We described the question to be considered as follows:

"In every instance in which the Board of Health adopts regulations which have the effect of prescribing permanent rules of conduct the validity of those regulations must be determined by an analysis of first, whether or not power to adopt the regulations in question has been conferred upon the Board of Health, and second, whether or not the subject matter of the regulations is such that the power to adopt regulations may properly be delegated to an administrative body." 20 Op. Corp. Coun. 27 (No. 10142).

The resolution enacted here is traceable to no specific grant of authority over this subject matter but rather to the general grant of rule-making power found in section 9-13.

While it is possible to construe this grant of rule-making power as being broad enough to embrace the present subject matter, it is this very breadth which opens the way to possible attack as to validity, in the courts. The task of sustaining any resolution is made easier when it is possible to point to a direct grant of rule-making power over the specific subject matter involved.

The second test referred to above is whether the subject matter of the regulations is such that the power to make regulations thereover may properly be delegated. The general principle has been stated to be:

"While the legislature may not divest itself of its proper functions or delegate its general legislative authority, it may still authorize others to do those things which it might properly, yet cannot understandingly or advantageously, do itself." *Arms v. Aver*, 192 Ill. 601 (1901).

While we believe the resolution is within the general power delegated to the Board of Health under section 9-13 of the Municipal Code, if the power of the board is questioned, defense of the resolution would be strengthened if it were enacted into an ordinance or if the City Council passed an ordinance giving the Board of Health specific power to adopt a regulation of this type.

One other minor matter of draftsmanship is called to your attention. The words "and/or" appearing in the first sentence of Regulation I should be stricken, and the word "or" substituted therefor.

POULTRY SLAUGHTERING ESTABLISHMENT

(No. 11831—President, Board of Health—M. I. W.—June 22, 1954.)

In your letter of March 26, you state that you have on hand an application for a license to conduct a live poultry slaughtering establishment at 4741 N. Kedzie Avenue. You further state that your inspector reported that the premises for which the license was requested was a three story building with apartments above the store in which the poultry shop is located. You

report your action of refusal to approve this license on the authority of section 95-29.5 of the Municipal Code of Chicago, which reads as follows:

"No license to any person for any premise not heretofore licensed shall be issued for the conduct of any such establishment within two hundred feet distant from any place or structure used as a church, school, library, hospital, public park, public playground or other public institution; from any building in which food is manufactured; or from any building used for residence purposes."

You report receipt of a letter from an attorney representing the applicants claiming that these premises were used for the slaughter of poultry under a class 2 retail food license prior to the passage of the poultry ordinance in December of 1950; that subsequent thereto slaughter on the premises was discontinued and that only dressed poultry was sold on the premises, and that the board of health is misinterpreting the ordinance in withholding a license.

You request our opinion as to whether under section 95-29.5 a license should issue to a poultry slaughtering establishment in a building used for human habitation where live poultry was sold under a retail food Class 2 license prior to the enactment of the poultry ordinance, but where no live poultry has been slaughtered since that time, and where a new owner now applies for a license.

The prohibition laid down in the ordinance is expressly limited in its operation "to any person for any premises not heretofore licensed." In extending its terms to include "any person" for "any premises heretofore licensed", the city council chose language which is not limited in its scope to previously licensed persons, but rather to previously licensed premises, thus expressing its clear intention to permit sale of premises to successor owners who can benefit from the rights to continue operations.

In an opinion dated April 11, 1946 addressed to the City Collector we considered a situation under the Liquor Control Law, which contained a prohibition against issuance of a license for the sale of liquor within 100 feet of any church, coupled with an exemption from this provision in the case of renewal of the license where a church had been established since the issuance of the original license. We held in that opinion that it would not be improper to issue a license to a duly qualified applicant who was the successor of the former licensee. In so holding we said:

"While it is true that the renewal of a license without qualification refers both to the person applying and to the premises, the language employed in the amendment which specifies and emphasizes the premises and makes no mention of the licensee or person, indicates that it was the intention of the legislature that the 100 feet prohibition shall not apply to a lawfully established tavern or liquor store. The substitution of one person qualified to receive a license for another bears no reasonable relation to the purpose of the amendment which was as we view it the protection of an established and going business."

The language of the poultry ordinance is even clearer on this point than the Liquor Control Law and a similar result is inescapable without any problem of reconstructing legislative intent. Since the facts show that the former licensee would not have been barred from obtaining a license under the terms of section 95-29.5, his successor on those premises would likewise not be barred.

The next question for determination is whether this eligibility for licensing is clouded because of a lapse of the use which is the subject of the license. The ordinance itself presents no such conditions and we know of no legal principle which inserts such a provision in the absence of a legislative expression to that effect. Such a principle is found in the Chicago Zoning Ordinance where abandonment of a non-conforming use for a given period of time acts under the ordinance as a bar to subsequent re-introduction of

that use. Even under such an explicit provision we have held that the owner of a store had a vested right to continue that use although the premises were for a time used as a residence where it was not the intention of the owner to abandon the use of the premises for store purposes, 18 Op. Corp. Coun. 571 (No. 7349). No intention to abandon the use is found here. Rather, the facts show that the original owner had applied for a license to slaughter poultry and refrained from this activity because his application was rejected by the board of health on other unrelated grounds. In an opinion to the Deputy, Acting for the Mayor, Department of Buildings, 18 Op. Corp. Coun. 574, (No. 8290) we held that failure to procure a license did not work a forfeiture of the owner's right to continue a nonconforming use under the zoning ordinance.

We emphasize again that the above opinions are based on an ordinance that provided for forfeiture of the right to use after a lapse of use. Where no such provision is expressed, limiting the use of property by unwarranted construction, is open to questioning as to whether requirements of due process are met. In derogation of property rights our courts have rather applied principles of strict construction.

It is, therefore, our opinion that under section 92-29.5 a license may properly be issued to a poultry slaughtering establishment in a building used for human habitation where poultry was slaughtered up to the time of the enactment of the ordinance but where no slaughtering has taken place since that time.

OUT-OF-STATE BURIAL CERTIFICATES

(No. 11843—*President, Board of Health—M. I. W.—August 19, 1954.*)

In your letter of July 27 you point to an apparent conflict between the requirements of a State statute and a City ordinance regarding the contents of out-of-state burial certificates.

Section 9.01 of An Act in relation to births, still-births and deaths and to provide for the registration and the establishment of records thereof, approved June 22, 1915 L 1915, p. 660; as amended reads as follows:

"Whenever a dead body is transported from one registration district of the state to another district, the body must be accompanied by a properly issued burial or removal permit from the registration district in which the death occurred or the body was found and such burial permit shall be accepted as sufficient basis for the burial or other disposition of the body designated in the permit, provided, that the body has been transported in compliance with the rules and regulations of the Department of Public Health for the transportation of the dead and, provided, further, that in any city of over 500,000 population which by local ordinance requires a local burial permit for final disposition of a body, the burial permit accompanying the body shall be accepted as a basis for the issuance of a local burial permit. Whenever a dead body is transported into the state from a jurisdiction other than Illinois it shall be accompanied by a burial, removal or transportation permit issued in accordance with the law and health regulations of the place where death occurred and this permit shall be accepted in lieu of a permit issued in the State of Illinois under the provisions hereinabove recited, provided, that the state in which the permit was issued extends such reciprocity to the permits issued in Illinois and in case such reciprocity is not accorded Illinois permits then the permit shall constitute basis for the issuance of an Illinois permit by the registrar of the district which was the destination of the body." (Chap. 111½, Ill. Rev. Stat. par. 44a (1953).)

Paragraph 2 of Section 93-12 of the Municipal Code of Chicago reads as follows:

"No person licensed as an undertaker or acting as an undertaker's assistant, nor any common carrier or person engaged as an expressman or public carter, shall receive from any railroad company, steamboat line, express company, or other persons engaged as a common carrier or in the conveyance of passengers, freight, or merchandise for hire or reward, any dead human body brought from any place outside the limits of the city, unless there shall be presented with such dead body a permit or certificate from the board of health of the place where the death occurred. *Such permit or certificate shall contain the name and age of the deceased, the date, hour and place of death, the cause of death, whether contagious or non-contagious, and the name of the physician or coroner certifying to such death;* and if such death shall have been caused by reason of any infectious or contagious disease, or if such body shall be in an offensive condition or in a condition dangerous to the health of the community, such body shall not be received by any such person unless, in addition to such permit or certificate, there shall be produced the permit of the board of health for the bringing into the city of such body provided for in this section." (Emphasis added.)

The conflict in question is occasioned by the statutory requirement that a burial removal or transportation permit issued in accordance with the law and health regulations of the place where death occurred shall accompany a dead body brought from out of State into Illinois and the instruction that such a permit be accepted in lieu of a permit issued in the state of Illinois, as opposed to the City's ordinance, which specifies certain detailed information which must be included on such an outside permit. Thus where a permit properly issued under the laws and regulations of another state, meeting the reciprocity requirement set forth in the statute, did not contain the specific information called for in the ordinance, a conflict would be presented.

You request our opinion as to whether the board of health may accept out-of-state burial permits on a reciprocal basis as provided by statute, or whether you should insist on conformance with the detailed requirements of the Municipal Code.

In studying this question it is helpful to determine the date of enactment of both the statute and ordinance. The Chicago Code of 1911 contains a provision identical to that found in the present ordinance. An examination of State statutes shows the first enactment on the matter of acceptance of permits from outside the local jurisdiction to have been the Act of 1915 cited above. Section 5 of which reads in part as follows:

" * * * Provided, that when a dead body is transported by common carrier into any registration district for burial therein, then the transit or removal permit issued in accordance with the law and health regulations of the place where the death occurred, shall be accepted by the local registrar of the district into which the body has been transported for burial or other disposition as a basis upon which he may issue a local burial permit." Laws 1915, p. 662.

The Supreme Court of Illinois has stated that the purpose of this Act "was to provide a system of registration of births and deaths throughout the state." *People v. Siman*, 278 Ill. 256, 258 (1917).

Shortly after the passage of the act the then Commissioner of Health requested an opinion of this office regarding an apparent conflict between this act and an ordinance of the City covering the same subject matter. We stated at that time that we found no conflict in terms of the question then raised and added the following:

"Even if there were a conflict between the ordinance and the statute, it is the well-settled law of this state that where there is a conflict in the provisions of an ordinance and a statute, the provisions of the statute must prevail." (9 Op. Corp. Coun. 932, 935.)

We believe that the above opinion correctly expressed the law on this matter. The fact that the State announced the rules governing this subject after our ordinance was passed lends even greater weight to this conclusion. There appears to have been no intention on the part of the City Council to set a standard different than that of the State. Up to the time the Council spoke on this matter the State had been silent. Once the State established the overall rules the Council spoke no more. Adding even further justification for this view is the fact that we are dealing here with a matter of reciprocity between states. In such cases the State Legislature is particularly and almost necessarily the logical voice in such questions and its authority is unquestionably superior to the City's.

It should also be noted that this is not a case where conflicting standards are set by State and City for the conduct of citizens generally. In some situations of this sort there arise problems presenting niceties of law as to whether there exists power in the City to exact a higher standard of performance of its citizens than the State has elected to require. Here the operation of the statute is directly on the local authorities themselves, upon whom a mandatory duty is placed by the statutory instruction that a permit of the type described "*shall be accepted in lieu of a permit issued in the State of Illinois.*"

The establishment of a further condition to this statutory command would violate the plain injunction of the Legislature.

We are, therefore, of the opinion that you must accept out-of-state burial permits which conform with the standards set by the governing statute and should not insist that they conform with the specific requirements of the Municipal Code.

In view of this conflict we have prepared an ordinance which would remove from section 93-12 the requirement for specific information. You will note that the draft we have prepared adds the condition that the body shall have been transported in accordance with the rules and regulations of the Illinois Department of Public Health. This provision is found in the statute and is included here since it represents a further condition for the acceptance of dead bodies from outside the City.

It is suggested that you transmit this ordinance to the City Council for enactment.

MEDICAL EXAMINATIONS FOR DAY NURSERY ADMITTANCE

(No. 11861—President, Board of Health—M. C. H.—October 26, 1954.)

This is to acknowledge receipt of your letter in which inquiry is made as to whether or not there is anything in the law of Section 158-8 of the Municipal Code of Chicago that prevents you from enforcing that portion which deals with the medical examination by the nursery physician of children admitted to said nursery school and the inoculation for the prevention of contagious diseases over the objections of the child's parents or guardian; or, in the alternative, exclude the children from a day nursery school when such objections are raised by the parents or guardian. These problems mostly confront public school boards where compulsory vaccination is required before the child is admitted to class.

On the question of compulsory vaccination it must be conceded that the cases in Illinois are unanimous in holding that a school board cannot compel a child to submit to vaccination unless there is evidence of an

epidemic of smallpox. The reason for these decisions may be traced to Section 1 of Article 8 of the Constitution of 1870, which provides:

"The General Assembly shall provide a thorough and efficient system of free schools, whereby all children of this state may receive a good common school education."

The court has held that under this provision of our State Constitution a board of education cannot make vaccination of school children a prerequisite to their admission to public schools. *Hageler v. Larner*, 284 Ill. 547; *Potts v. Breen*, 167 Ill. 67; *Lawbaugh v. Board of Education*, 177 Ill. 572.

Section 158-8 of the Municipal Code of Chicago provides in part:

"Each child, upon application for admission, shall be stripped and given a thorough and complete medical examination by the nursery physician or at a dispensary or infant welfare station. Such examination shall include the necessary laboratory tests. *Children may be admitted only where the results of the aforesaid examination show the child to be free from contagious or communicable disease and duly protected against contagious disease.* Every child shall be re-examined for admission after an absence of one week. All expense of the aforesaid examinations shall be borne by the day nursery. * * *" (*Italics supplied.*)

We fail to find any reason or authority which holds that the provisions of Section 1 of Article 8 of the Constitution of 1870, which provides, "The General Assembly shall provide a thorough and efficient system of free schools, whereby all children of this State may receive a good common school education" has any application to privately operated day nurseries, nor is there any other constitutional provision concerning day nurseries.

The power granted under this ordinance to the Board of Health to insist on each child having been "duly protected against contagious diseases" before admission to the day nursery is an exercise of the police power authorized by Section 23-81 of the Revised Cities and Villages Act which grants the City power to "do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease."

It is, therefore, our opinion that under Section 158-8 the Board of Health may legally require the exclusion of children from a day nursery where the parents or guardians have refused to permit medical examinations, including the necessary laboratory tests for the protection against contagious disease as required by this ordinance.

X-RAY LABORATORY

(No. 11964—President, Board of Health—A. F. G.—October 11, 1955.)

In your letter of September 15, 1955 you call attention to several sections of Chapter 144 of the Municipal Code of Chicago and request our opinion as to their applicability to a certain state of facts named therein.

You cite Section 144-1 which defines the word "laboratory" in part as follows:

"The word 'laboratory' is hereby defined to mean any building or establishment maintained or operated for the purpose of making * * * X-ray or other scientific examinations, analyses, determination or experiments."

Section 144-2 provides:

"No person shall conduct or operate any laboratory or laboratory agency for a fee without first having obtained a license therefor."

Section 144-4 reads in part as follows:

"Class III. A laboratory conducted by a person in connection with another business where such laboratory does not directly serve the public for pay and which is maintained as a part of his principal industry or profession. Such laboratories shall be exempt from the payments of the license fee."

Section 144-6.1 provides:

"Every laboratory shall at all times be open to inspection by the board of health and the commissioner of buildings whenever and as often as they shall deem proper."

You cite the case of Dr. S..... C. S....., M.D. who was reported as conducting an X-ray laboratory at 1525 E. 53rd Street, without a license. An investigation by your body disclosed that Dr. S..... is in the navy, and the laboratory is now in charge of Dr. J..... H....., M.D. This doctor states that the offices are devoted exclusively to the practice of radiology, which he states is a branch of medicine, and that he does not require a laboratory license as he has a license to practice medicine.

However, you state that "Dr. H..... does collect a fee for his services directly from the patients sent to him by other agencies."

If Doctor X sends a patient to Dr. H.....'s laboratory for the purpose of having an X-ray taken, with instructions to forward the plate to Dr. X for diagnosis and treatment, and Dr. H..... collects a fee for his services from the patient or from Dr. X, we do not think, in such a case Dr. H..... is practicing medicine, but merely conducting an X-ray laboratory for a fee, which in our opinion brings his laboratory within the license provisions of section 144-2, quoted above.

On the other hand if an M. D. maintains an X-ray laboratory for the use of his own patients in connection with his own practice of medicine we think his laboratory falls within the provisions of Class III of section 144-4, which exempts such laboratories "from the payment of a license fee."

In view of section 144-6.1 which authorizes the inspection of every laboratory as often as it is deemed proper (which is not practical unless each laboratory is licensed), and in view of the fact that the exemption provided in section 144-4 are from the payment of the license fee, not from the requirement of securing a license, we are of the opinion that it was apparently the intention of the city council to require all laboratories to be licensed. The unfortunate wording of section 144-2 which limits the requirement for license to those laboratories which charge a fee renders the intention of the council doubtful.

We would suggest that if you feel that all laboratories should be licensed for the protection of the public health and the better enforcement of the provisions of the Chapter, that the words "for a fee" be stricken from section 144-2, leaving the provisions of section 144-4 as they are. With such an amendment every laboratory would require a license, but only those laboratories named in section 144-4 would be exempt from the payment of the fee for such license.

If Dr. H..... does business as stated by you, he should be required to secure and pay for a laboratory license. In answer to your second question "Shall X-ray laboratories operated by a Doctor of Medicine be required to obtain a city license?", our answer depends on the manner in which the laboratory is conducted. If as pointed out above a doctor maintains an X-ray laboratory for the benefit of his own patients in the course of his own practice, and charges no fee therefor, we do not believe he should be required to be licensed under Chapter 144. If he takes X-ray pictures promiscuously for others and charges a fee therefor, the fact that he is a licensed doctor would not exempt him from the license requirement.

VETERINARIAN FOR BOARD OF HEALTH

(No. 11989—President, Board of Health—M. C. H.—December 13, 1955.)

This is to acknowledge receipt of your letter to this office in which our opinion is requested whether or not there is any existing law requiring the Chicago Board of Health to assign a licensed veterinarian to observe biting dogs impounded at the Municipal Animal Shelter for symptoms of rabies. Please be advised that section 9-11 of the City Code provides as follows:

"The board of health shall perform the following duties:

(a) Enforce all the laws of the state and provisions of this code in relation to matters pertaining to the public health and the sanitary condition of the city:"

Section 98-40 of the City Code provides as follows:

"It shall be the duty of every veterinarian or other person who discovers any dog or other animal to be suffering with rabies to report such fact immediately to the Board of Health. Such report shall give the name, if known, and the place of residence of the person owning or harboring such dog, the place where the dog can be found, and the license number of said dog, if known. *Such dog or other animal shall be immediately taken up and impounded in the manner provided in this chapter, and securely kept until the Board of Health can make or cause to be made an examination of said dog or other animal.* If upon such examination, it shall be determined that said dog or other animal is suffering with rabies, said animal shall be immediately killed." (Italics supplied.)

In view of the provisions of the City Code in sections 9-11 and 98-40, we are of the opinion that it becomes the duty of the Board of Health to assign some person qualified to make such an examination of the biting dogs or other animals impounded and determine whether or not such dogs or other animals are suffering with rabies.

JURISDICTION OVER LA RABIDA SANITARIUM

(No. 12036—President, Board of Health—M. C. H.—April 26, 1956.)

This is to acknowledge your letter to this office in which inquiries are made to whether or not the President of the Chicago Board of Health can act as an authorized agent for the State Public Health Department in inspecting and recommending for state license all hospitals located in the City of Chicago, and whether or not the State of Illinois and the Chicago Board of Health have the right to inspect LaRabida Sanitarium and require said LaRabida Sanitarium to obtain a City and State Hospital license.

Please be advised that Section 137-18 of the Municipal Code of Chicago provides as follows:

"Every hospital shall at all times be open to inspection by the board of health and the commissioner of buildings whenever and as

often as they shall deem proper. The dispensing or serving of food in a hospital shall comply with the health and sanitary requirements of chapter 130 of this code and subject to inspection as therein provided." (Amend. Coun. J. 1-30-46, p. 4977; 6-25-47, p. 456.)

Chapter 127, Section 55.21 provides for the inspection from time to time of all hospitals, sanatoria and other institutions conducted by County, City, Village or Township authorities and to report as to the sanitary conditions and needs of such hospitals, sanatoria and institutions to the official authority having jurisdiction over them.

The powers given the Chicago Park District are as follows:

"The Chicago Park District shall have power to acquire, lay out, establish, construct, and maintain parks, driveways, and boulevards in such districts, and to control, manage, and govern such parks, driveways, and boulevards, and the use thereof. * * * The commissioners of such district shall constitute the corporate authorities thereof, and shall have full power to manage and control all the officers and property of the district, and all parks, driveways, boulevards, and parkways maintained by such district or committed to its care and custody."

Neither the new Chicago Park District nor the former Park Commissioners and Park Authorities, whose authorities were abrogated by the Chicago Park District, were specifically granted police powers with respect to the inspection of hospitals, sanatoria and other institutions found within the Chicago Park District. The power of inspection as to the sanitary conditions and needs of such hospitals, sanatoria and institutions is lodged in the Public Health Department of the State of Illinois and in the Chicago Board of Health Department under sections above cited.

It is our opinion that the State of Illinois has the power to inspect and license LaRabida Sanitarium and that the Chicago Board of Health also has the right to inspect LaRabida Sanitarium and require said sanitarium to obtain a City license.

MANDATORY SEROLOGIC TEST

(No. 12058—President, Board of Health—M. C. H.—July 24, 1956.)

This is to acknowledge the receipt of your letter in which you inquire whether or not you are to continue the mandatory serologic test for syphilis on hospital admissions.

Please be advised that the only provision I find in the statutes for mandatory serologic test for syphilis is for pregnant women, Chapter 91, Paragraph 113a-113c, Illinois Revised Statutes, which provides as follows:

"Every physician, or other person, attending in a professional capacity a pregnant woman in Illinois, shall take or cause to be taken a sample of blood of such woman at the time of the first examination. Said blood specimen shall be submitted to a laboratory approved by the State Department of Public Health for a serological test for syphilis. In the event that any such blood test shall show a positive or doubtful result, a second test shall be made. Such serological test or tests shall, upon request of any physician in the State, be made free of charge by the State Department of Public Health or the Health Departments of cities, villages and incorporated towns maintaining Health Departments."

The Rules and Regulations for the Control of Communicable Diseases issued by the Department of Public Welfare, August 1, 1952, provides as follows:

Examination of Inmates of Jails, Medical Institutions, Etc.

"Any person apprehended and/or committed to or confined in any lock-up jail, house of correction or other penal or correctional institution, detention hospital, or any State, county or city charitable institution, shall be given a thorough medical examination at the time of admission to determine the existence of any venereal disease. If a person is found to be infected with any venereal disease in an infectious stage, he shall be removed promptly to quarters where proper treatment and control can be maintained and there held in quarantine for such time as is necessary to render the patient non-infectious."

It is safe to assume that it is the intention of the State Health Department to make the serologic test for syphilis upon inmates of jails, medical institutions, etc.; mandatory.

All other institutions, hospitals not above enumerated, may feel free to forego such tests on hospitalized patients without any concern of their failure to comply with the regulations issued by the Department of Public Health as above stated.

It is our opinion that the serologic test for syphilis only applies to pregnant women as required by statutes and inmates of jails, medical institutions and etc., as promulgated by the Rules and Regulations of the Department of Public Health of August 1, 1952.

CLOSING NURSING HOME

(No. 12149—President, Board of Health—E. W. P.—August 7, 1957.)

We have your letter of July 16, 1957, in which you request a written opinion relating to the responsibility of the Board of Health in closing homes when the owner or operator has been fined for having violations. You further advised us the oral opinion given to you by Maurice C. Handelman, Assistant Corporation Counsel, assigned to the Board of Health for your convenience and consultation.

Section 136-7 of the Municipal Code provides that the building used as a home shall comply with the building provisions and fire regulations of the Code and Section 136-8 further amplifies the provisions as it relates to frontage, floor space per patient, exits, fire escapes and stairways.

Section 136-14 which relates to the power of the Board of Health to close a home reads as follows:

"Any person violating any of the provisions of this chapter shall be fined not less than ten dollars nor more than two hundred dollars for each offense, and a separate and distinct offense shall be considered as having been committed for each and every day on which any person shall be guilty of any such violation; provided, that in the event of a conviction of any such person for a violation of any of the provisions of this chapter relating to the safety and accommodation of inmates, it shall be the duty of the board of health, and it is hereby authorized and empowered, to close such home, and to cause its vacation pending the repairs, alterations, or additions necessary to make it safe and proper for the occupancy of its inmates, and to make it comply with the terms of this chapter."

You will note in the reading of Section 136-14 of the Code that neither the fine imposed nor the conviction of an owner of a home is the controlling factor for closing the home. The owner could conceivably have made the necessary repairs at the time of his conviction for a prior violation of any provision of the Code.

We are confirming the opinion given orally to you by Mr. Handelsman that you are not to proceed to close a home when the owner or operator has been fined for violations according to the provisions of the Municipal Code unless either your inspection or a report to you of inspection by another department of the City develops that the home is in violation of the Municipal Code relating to the safety and accommodation of the inmates, and in that event to follow the provisions of the Code as set forth in Section 136-14.

NURSING HOME STANDARDS

(No. 12233—President, Board of Health—L. A. W.—June 18, 1958.)

We have your inter-office communication dated June 6, 1958, requesting an opinion concerning minimum standards for bathroom fixtures in nursing homes.

Chapter 111.5, paragraph 35.30 of the Illinois Revised Statute provides in part:

"Any city, village or incorporated town may, by ordinance, provide for the licensing and regulation of nursing homes, sheltered care homes, and homes for the aged, or any classification of such homes, as defined herein, within such municipality, *provided that the ordinance requires compliance with at least the minimum requirements established by the Department pursuant to Sections 4 and 11 of this Act.*"

Chapter 111.5 of the Illinois Revised Statute (1955 Ed.) provides minimum standards, rules and regulations governing the operation of nursing homes and homes for the aged. Section 3 of said rules and regulations provides as follows:

"b. The bathroom fixtures shall be provided in the following minimum numbers:

b-1. One lavatory and one water closet for each ten (10) residents on each floor.

b-2. One bathtub or shower for each twenty (20) residents on each floor. The number of resident beds shall be used in determining the number of bathroom fixtures required, irrespective of the fact that some of the residents may not be able to get to the bathroom."

Chapter 66-5.3 of the Municipal Code of Chicago dealing with the number of water closets for institutional units provides one water closet for one to ten persons and *two water closets for eleven to twenty-five persons.*

The question presented, whether a City ordinance which imposes a less stringent standard than the State Statute is valid and enforceable, represents the converse of the problem in connection with the City's present taxicab license ordinance which was litigated in *Jones v. City of Chicago*, 348 Ill. App. 310. There the Court sustained the City's requirement of insurance coverage of \$50,000.00 to \$100,000.00 in the face of an attack

predicated on the theory that it was in conflict with the State Statute requiring only \$15,000.00. In reaching that contention, the Court said:

"An ordinance, because of local conditions, may impose more regulations or definite regulations under a proper delegation of power in addition to those imposed by the State."

In *City of Chicago v. Ice Cream Company*, 252 Ill. 311, at page 315, the Court held:

"Municipal authorities cannot, under a general grant of power, such as article 5 of the City and Village act, adopt ordinances which infringe the spirit of a State law or are repugnant to the policy of the State as declared by general legislation, but the police regulations of a municipality may differ from those of the State upon the same subject, if they are not inconsistent therewith."

The reasoning behind this rule is, manifestly, as was argued in the Jones case, that a conflict only arises when the standard imposed by the City is more liberal. Applied to the instant case, it appears that Section 66-5.3 of the Municipal Code is void and inapplicable as to the subject matter (nursing homes) covered by the State Statute. To hold otherwise would raise a conflict between the two. We must, therefore, yield to the sovereign State of Illinois and enforce the provisions of the State plumbing requirements insofar as nursing homes are concerned.

NURSING HOME HEARING BOARD

(No. 12296—Hearing Board Chairman—E. W. P.—September 17, 1959.)

We acknowledge receipt of your letter of September 3, 1959, addressed to the Corporation Counsel of the City of Chicago, in which you request an opinion as to the interpretation of Section 136-8 of the Municipal Code of the City of Chicago. You quote the pertinent section of the Code in your letter, which section reads as follows:

"136-8. Hearing board.) The mayor shall appoint a hearing board consisting of the president of the board of health, the fire commissioner, the commissioner of buildings, the corporation counsel, and the city collector or a duly qualified employee designated by the head of the department in which said person is employed. Said board shall pass on applications for license for nursing homes, shelter care homes, homes for the aged which have been denied for any of the following reasons:

"A. Failure to meet the minimum standards prescribed in this chapter.

"B. Conviction of the applicant, or if the applicant is a firm, partnership or association of any of its members, or if a corporation, any of its officers or directors, or of the person designated to manage or supervise the home, of a felony or of two or more misdemeanors involving moral turpitude as shown by a certified copy of the record of conviction, or in the case of a conviction of a misdemeanor by a court not of record, as shown by other evidence or other satisfactory evidence that the moral character of the applicant, manager or supervisor of the home is not reputable.

"C. Personnel insufficient in number or unqualified by training or experience to provide proper and adequate care for the number and type of residents.

"D. Insufficient financial or other resources to operate and conduct the home in accordance with the requirements of this chapter and the minimum standards, rules and regulations promulgated thereunder."

You ask whether or not this section requires that the Police Department approve all applications for license for nursing homes, sheltered care homes and homes for the aged. It is our opinion that there is no such requirement in Chapter 136, either directly or indirectly.

The provision relating to the application for a license in Section 136-3, Sub-Section (e) requires such information relating to the number, experience, and training of the employees of the home, and of the *moral character of the applicant and the employees* as the Chicago Board of Health may deem necessary. This proof of good moral character may be furnished by the applicant in the form of a sworn affidavit with suitable references should the Board deem this necessary, or in any other form that the Board might reasonably determine, but there is nothing in the Chapter that requires that the Police Department must approve the application.

Relative to your inquiry as to whether or not partners, or members of the partnership, or association, the officers or directors of a corporation, or the person designated to manage any of these homes must be fingerprinted, in our opinion there is no requirement and it is also our opinion that any such requirement could not be enforced. While it may be true that the taking of fingerprints is the only positive way of determining if there is a criminal record, such a drastic procedure in our opinion would have to be spelled out in the Code in order to be effective.

In answer to the last question which you propound in your letter as to whether the Hearing Board, after hearing evidence presented, has the right to recommend approval of any license involved where a violation of the Municipal Code still exists, under Sub-paragraph "A" of Section 136-8, it is within the province of the Hearing Board to determine whether or not the applicant meets the minimum standards prescribed by Chapter 136.

The Hearing Board hears appeals taken from a denial of license by the City Collector and after hearing evidence, the Board may uphold the City Collector, or may decide that the denial was arbitrary or capricious and without reasonable grounds, and rule that the City Collector issue a license to the applicant. Such a direction should be followed by the City Collector.

D. MUNICIPAL TUBERCULOSIS SANITARIUM

CHAPEL MAINTENANCE

(No. 11823—*Superintendent, Municipal Tuberculosis Sanitarium—C. P. H.—May 25, 1954.*)

We have your letter of May 24, 1954, wherein you request our opinion as to whether or not the Board of Directors of the Municipal Tuberculosis Sanitarium of the City of Chicago have authority to expend sanitarium funds for the repair and maintenance of the roof of the chapel building located on the grounds of the sanitarium.

On October 14, 1935, the Board of Directors passed a resolution accepting the offer of and granting consent to Frank J. Lewis to erect a chapel on the grounds of the sanitarium, at a cost of approximately \$50,000, where religious services may be celebrated and performed in accordance with the rules and customs of the Roman Catholic Church. Thereafter, the City Council adopted an ordinance on October 23, 1935, appearing in the Journal of Proceedings of the City Council of that date at page 729, approving the action of the Board of Directors.

When we drafted and approved the ordinance and resolution in 1935, authorizing the construction of the chapel building on the grounds of the sanitarium, we considered the provisions of section 3 of Article VIII of the Constitution of the State of Illinois, which prohibit the use of public funds in aid of any church or for any sectarian purpose. We took into account the case of *Reichwald v. Catholic Bishop of Chicago*, 258 Ill. 44, wherein the court had before it a situation somewhat similar to the one here. The court held there, that this section of the constitution did not prohibit a church from erecting a church building on a poor farm, since such an arrangement results in a gift of the building, by the church, to the county, rather than any gift by the county to the church.

The chapel building was erected on the grounds of the sanitarium, under and by virtue of the resolution and ordinance referred to herein. The resolution expressly provides that title to the chapel building shall vest in the City of Chicago. The chapel building, therefore, is the property of the City of Chicago, which is being used for the benefit of the patients and employees of the sanitarium. Under section 72-6 of Article 72 of the Cities and Villages Act (para. 72-6 of chap. 24 of the Ill. Rev. Stat. of 1953), the Board of Directors of the sanitarium have exclusive control of all monies collected to the credit of the "Tuberculosis Sanitarium Fund." This section further provides that all such monies received shall be used for sanitarium purposes. It is, therefore, our opinion that the Board of Directors may properly expend sanitarium funds for the repair and maintenance of the roof of the chapel building located on the grounds of the sanitarium.

You also request our opinion as to whether or not the sanitarium would be liable under the provisions of the Workmen's Compensation Act of the State of Illinois for any injuries or deaths to employees of the sanitarium resulting from this repair and maintenance work.

Under section 3 of the Workmen's Compensation Act (para. 138.3 chap. 48, Ill. Rev. Stat. 1953), the provisions of the Act apply automatically and without election to the City of Chicago and to all its employees engaged among other things in the erection, maintenance, removing, remodeling, altering or demolishing of any structure. Under section 72-6 of Article 72

of the Cities and Villages Act (para. 72-6, chap. 24, Ill. Rev. Stat. 1953) all officers and employees of the Municipal Tuberculosis Sanitarium of the City of Chicago are deemed to be officers or employees, as the case may be, of the City of Chicago. In view of these provisions, it is our opinion that the sanitarium would be liable under the provisions of the Workmen's Compensation Act for any injuries or deaths to its employees arising out of and in connection with the repair and maintenance of the roof of the chapel building located on the grounds of the sanitarium.

EMPLOYEES' WORKING CONDITIONS

(No. 11869—Board of Directors, M. T. S.—E. R. H.—November 19, 1954.)

We acknowledge your letter of November 3, 1954 addressed to John J. Mortimer, Corporation Counsel, enclosing a copy of a letter to Mr. T. J. Cooney of the Sanitarium, from Attorney Ralph C. Hartsough, Jr. stating that he was representing some kitchen employees of the sanitarium, and your report covering wages, hours, working conditions, etc. of such employees, upon which you ask our comment.

We have conferred with Messrs. Cooney and Hartman in connection with the matter and they do not have any information from Attorney Hartsough other than that contained in the copy of his letter above referred to in which he enumerates 4 items. Items No. 1 and No. 2 need no comment. In Item No. 3 of his letter he refers to what he terms discrimination against kitchen employees in regard obliging them to work a six-day week consisting of 48 hours. Paragraph 8B of Chapter 48, Illinois Revised Statutes (1953) provides:

"Every employer operating any factory, mercantile establishment, transportation or public service company, hotel, or apartment hotel, restaurant, hospital, laundry, telegraph or telephone establishment, banking institution, brokerage business, theatre or freight or passenger elevator in this State, or any employer engaged as a contractor to furnish or supply labor upon a contract to any person, municipality or county institution of this State, or any office thereof, shall allow every person except those specified in Section 3 of this Act, employed in, about or in connection with, such business or service, at least twenty-four consecutive hours of rest in every calendar week in addition to the regular period of rest allowed at the close of each working day."

Section 25-9 of the Municipal Code provides:

"Eight hours of labor shall be and constitute a day's work for all employees performing manual labor for the city. The provisions of this section shall not be construed to apply to or govern the police or fire departments, or any department or workshop where constant operation is necessary. Provided, however, that in cases of necessity or emergency, superintendents, foremen or others in authority are hereby authorized to work their employees such number of hours as such necessity or emergency may require, but for all labor performed in excess of eight hours in any one day such laborer or employee shall be entitled to and shall receive pay at the rate of time and one-half for all such labor performed, except in those employments where there is an established scale of wages and hours which is usually and customarily paid for such excess time by employers generally within the city for like services, in which event such labor in excess of eight hours in one day shall be paid for according to the wage scale, hours and conditions so established.

"Provided, however, that all mechanics and skilled and unskilled laborers employed by the several departments or other agencies of the city government, excepting those employed in the pumping stations, shall be required to work only until twelve o'clock noon every Saturday."

It is, therefore, not unlawful that such employees work a six-day week, or an eight-hour day.

If there is a dangerous and unsanitary condition by reason of water seepage on the floor and inadequate and improper ventilation as stated in Attorney Hartsough's Item No. 4, you, no doubt, will remedy these conditions.

We have examined your report covering your hospital helpers' wages, hours and other services received by them, and in our opinion there is nothing therein contained violative of any law pertaining to employment.

In this connection we call your attention to paragraph 72-6 of Chapter 24, Illinois Revised Statutes (1953) pertaining to tuberculosis sanitariums in which it is provided, among other things, that the board of directors of the sanitarium

"Has the power to appoint suitable superintendents or matrons or both, and all necessary assistants and other employes, to fix their compensation and remove such appointees. The board in general shall carry out the spirit and intent of this article in establishing and maintaining a public sanitarium * * *."

The board of directors, therefore, is chargeable with the responsibility of all matters touching upon the employment of such employees.

HIRING PARK DISTRICT EMPLOYEES PART TIME

(No. 11956—*Superintendent, Municipal Tuberculosis Sanitarium—R. N.—September 16, 1955.*)

You ask an opinion from this department as to your authority to employ on a part-time basis an instructor presently employed by the Chicago Park District. The facts indicate that the hours would in no way conflict and further indicate that such an arrangement would be desirable and workable, unless prohibited by law or by some regulation governing employment under more than one municipal payroll.

The position of part-time instructor with which your inquiry is concerned is a temporary position not under civil service. Therefore no regulation of the civil service commission need be here considered. Chapter 25 of the Municipal Code of Chicago deals generally with the subject of officers and employes. It contains no general prohibition against the employment of persons engaged in other lines of activity or in the employ of other municipal corporations. Section 25-27 provides: "The head of each department, board or other agency of the city government shall prescribe such rules and regulations for the governance of his department, board or other agency as he shall deem necessary and proper.

He shall furnish a copy of said rules and regulations to all subordinate officers and employes in his department, board or other agency and all said officers and employes shall be subject to such rules and regulations so prescribed and to the provisions of this code." Such regulation may or may not be imposed by the Municipal Tuberculosis Sanitarium in the judgment of its board of directors.

Section 13-28 of the Code contains the following regulation: "Every employee in the department of buildings shall devote all of his efforts to such employment, and shall not be engaged in any other business or vocation."

In the absence of any such prohibition relating to the Municipal Tuberculosis Sanitarium or any such regulation imposed by your board of directors, it is our opinion that there is no legal obstacle to the course you indicate you wish to pursue. The Chicago Park District is a municipal corporation separate and distinct from the city of Chicago and therefore the question of employment under more than one city payroll does not here arise.

We call your attention here to Section 19 of Division 2 of Rule VII of the Chicago Park District which reads, in part, as follows:

"No officer or employee of the Chicago Park District shall engage in a business, profession, trade or occupation while actually employed by the Chicago Park District which will (1) Impair his efficiency; (2) Seriously interfere with such officer's or employee's ability to satisfactorily perform his duties; and (3) Impair or reflect upon the reputation of the Chicago Park District.

"As a condition precedent to any officer or employee of the Chicago Park District engaging in a business, profession, trade or occupation while actually employed by the Chicago Park District, every such officer or employee shall report the nature and extent of such business, profession, trade or occupation to his department head upon forms furnished to him for such purpose."

We have been informed that in the past it has been the policy of the Park District in ordinary situations to limit the time allowed in outside employment to twenty hours a week.

ENFORCEMENT OF LIQUOR RULE

(No. 11969—*Superintendent, Municipal Tuberculosis Sanitarium—J. P. M.—October 19, 1955.*)

We acknowledge your letter of October 10, 1955 in which you request an opinion as to action which may be taken against violators of the regulations adopted by the Board of Directors of the Municipal Tuberculosis Sanitarium banning the carrying of liquor into the sanitarium grounds.

Chapter 43, Article VI, § 130, Illinois Revised Statutes, commonly known as the Illinois Liquor Control Act provides:

"No alcoholic liquors shall be sold or delivered in any building belonging to or under control of the State or any political subdivision thereof * * *."

Article X, § 183 of the Liquor Control Act provides that any person who violates any provisions of the Act shall be subject to a fine of not less than \$50.00 nor more than \$500.00 for the first violation, and for a second or subsequent violation not less than \$100.00 or more than \$1,000.00, or be imprisoned in the county jail not less than ten days nor more than six months.

It is the opinion of this office that a person violating the above could be placed under arrest and charged under the above quoted section of the Liquor Control Act. Any liquor taken from the violator should be turned over to the arresting officer for use as evidence in the trial of the violator and for disposition by the court.

Insofar as food is concerned may I call your attention to Corporation Counsel's Opinion #11159 of July 13, 1949 which deals with disposal of unauthorized food found in possession of patients, a copy of which is attached, (and set out in full below).

It is the opinion of this office that no arrest can be made for bringing unauthorized food on the premises. Any unauthorized food found on visitors entering the premises should be returned to the visitor upon leaving the premises.

(No. 11159—Tuberculosis Control Officer, M. T. S.—E. R. H.—July 13, 1949.)

This will acknowledge receipt of your letter of July 7, 1949, asking an opinion as to what action should be taken for the disposal of quantities of whiskies, gin, wine, beer and cigarettes which are forbidden to patients in the Sanitarium.

Section 72-6, chapter 24 of the Illinois Revised Statutes (1947) provides among other things:

"Immediately after their appointment the directors * * * shall adopt such by-laws, rules and regulations for their own guidance and for the government of the Sanitarium, branches, dispensaries, and auxiliary institutions and activities connected therewith as may be expedient, not inconsistent with this article and the ordinances of the city * * *."

The above statute is the authority to your Board of Directors to pass a rule prohibiting such articles within the Sanitarium. If the records of the Sanitarium do not now contain a formal resolution prohibiting such articles and providing for their seizure when found, such a resolution should be passed by the Board of Directors and publicly posted so that your patients and others may have notice of it.

Such property taken in violation of such rule should be returned to the patient upon leaving the Sanitarium, and in the event of the death of the patient, returned to his or her administrator or executor. Should the patient have no other estate to probate, upon proper affidavit furnished the Sanitarium, such property should be turned over to his or her next of kin under the statute of descent and distribution of the State of Illinois. The distribution of the property in case the patient has no other estate should be referred to this office for the proper affidavit. In case the patient, or his, or her next of kin, abandons such property it should, after a lapse of time or upon other facts tending to show abandonment, be turned over to the Purchasing Agent of the City for final disposition.

AUTHORITY TO PURCHASE ELEVATOR

(No. 12019—Board of Directors, M. T. S.—M. C. H.—March 6, 1956.)

This is to acknowledge your letter to this office in which inquiry is made whether or not the Municipal Tuberculosis Sanitarium as an occupant of the first and second floors of the Municipal Contagious Hospital is authorized under the statutes to expend the sum of \$10,000.00 towards the purchase of a new elevator. The powers and duties conferred upon the directors of the Municipal Sanitarium are set forth in Section 72-6, Chapter 24, Illinois Revised Statutes, and provides in part as follows:

"* * * The board has the power to purchase or lease ground within or without the corporate limits of the city or village, and to purchase, lease,

or erect appropriate buildings for the use of the sanitarium, branches, dispensaries, and other auxiliary institutions and activities connected therewith with the approval of the corporate authorities. It has the exclusive control of the construction of any sanitarium building or other buildings appropriate for its branches, dispensaries, and other auxiliary institutions and activities in connection with the institution, and of the supervision, care, and custody of the grounds, rooms, or buildings constructed, leased, or purchased for that purpose. The board has the power to appoint suitable superintendents or matrons or both and all necessary assistants and other employees, to fix their compensation, and to remove such appointees. The board in general shall carry out the spirit and intent of this article in establishing and maintaining a public sanitarium. * * *

It is our opinion that under the above provisions the board of directors of the Municipal Tuberculosis Sanitarium is specifically charged with a duty to care for the convenience, welfare and safety of the patients in said institution and that the purchase and installing of a new elevator and the upkeep of the property, machinery and equipment in a good and serviceable condition is considered in the eyes of the law a legitimate exercise of the power and right given to them expressly under said statutory provisions.

In view of the above we take the position that if the directors of the Municipal Tuberculosis Sanitarium are of the opinion that a new elevator is needed and desirable, it is within their power to expend \$10,000.00 towards the purchase of a new elevator.

VOLUNTEER WORKER

(No. 12045—General Superintendent, M. T. S.—M. C. H.—June 18, 1956.)

This is to acknowledge receipt of your letter to this office in which inquiry is made whether or not there is any obligations and liabilities when you accept the voluntary service of Mrs. Robert Goodson of 17 W. 270 Roosevelt Road, Villa Park.

Please be advised that when any volunteer worker in the Rehabilitation Department, or in any other department of your institution sustains any injuries arising out of and in the course of his or her employment, you will be liable in the same degree as you are to all other employees of the Municipal Tuberculosis Sanitarium, provided that the relationship of the employer and employee is established. The rule which the courts have laid down and followed, to determine whether the relationship of employer and employee exists, is if the person for whom the service is rendered retains the right to control the details of the work and the method or manner of its performance.

In the case of *Hartley v. Red Ball Transit Co.*, 344 Ill. 534; *Besse v. Industrial Commission*, 336 Ill. 283; *Bristol and Gale Co. v. Industrial Commission*, 292 Ill. 16; *Government and Civil Employees Organizing Committee CIO et al.*, Appellants v. *Cook County School of Nursing, et al.*, Appellees, 350 Ill. App. 274, this rule was adopted by the courts as a standard by which the liabilities of an employer to the employee could be enforced. The courts further hold "the right to control the manner of doing the work is an important, if not the principal consideration which determines whether the worker is an employee or an independent contractor" *Nelson Brothers & Co. v. Industrial Commission*, 330 Ill. 27.

In view of the foregoing we take the position that the obligations and liabilities of the Municipal Tuberculosis Sanitarium extends to volunteer workers as well as those on your payroll.

SEARCHING FOR CONTRABAND

(No. 12055—General Superintendent, M. T. S.—M. C. H.—July 18, 1956.)

This is to acknowledge the receipt of your letter to this office dated July 12, 1956, in which inquiry is made whether or not your Security Division has the right to search patients of your institution as well as visitors to determine whether or not they are in possession of prohibitive articles.

Please be advised that part of Section 72-7, Chapter 24 of the Illinois Revised Statutes (1951) provides as follows:

“* * *. The sanitarium always shall be subject to such reasonable rules and regulations as the board may adopt in order to render the use of the sanitarium of the greatest benefit to the greatest number, and the board may exclude from the use of the sanitarium those inhabitants and other persons who wilfully violate these rules and regulations. * * *.”

Your rules and regulations prohibiting intoxicating liquors, cigarettes and other prohibitive articles to patients in the sanitarium are unquestionably for the best interest of your patients and in furtherance of the statutory mandate “to render the use of the sanitarium of the greatest benefit to the greatest number”.

It is our opinion that you have the authority to search the patients as well as the visitors to determine whether or not they are in possession of prohibitive articles. This opinion is given in conformity with a previous opinion on the same subject dated March 14, 1952, No. 11499.

E. OTHER DEPARTMENTS AND OFFICERS

FIRE ALARM SYSTEM IN MIXED OCCUPANCY BUILDING

(No. 11785—Chief of Fire Prevention Bureau—A. F. G.—February 10, 1954.)

In your letter of January 26, 1954 you ask advice as to the proper construction of section 64-3 of the Municipal Code of Chicago with reference to the installation of Fire Alarm Systems.

Section 64-3 (a) is in part as follows:

“Fire alarm systems conforming to the requirements of Chapter 90 of this code shall be provided in buildings of the following occupancies:

“(1) Hotels having a capacity of more than twenty-five persons above the second floor except in buildings of Type 1-A, 1-B or 1-C construction. * * *.”

"Hotel" is defined in section 47-2 of the code as "a dwelling or part thereof, designed or used primarily for sleeping accommodations for more than ten guests or lodgers."

Buildings are classified according to their use or occupancy by Chapter 48 of the Building Code. Class A-2 multiple dwellings is defined in Section 48-2.2 as: Residence units designed or used for two or more family units or designed or used for sleeping accommodations, other than family units for more than ten persons shall be classified as Class A-2. Multiple dwellings shall include among others, the following:

Apartment Buildings	Hotels
Boarding Houses	Lodging Houses
Clubs	Monasteries
Convents	Rooming Houses
Dormitories	Tourist Homes
Fraternities	

You cite an example of a building which contains 28 apartments with an occupancy of more than 50 persons and which also contains 26 rooms for guests or lodgers with an occupancy of 42 persons, and ask the following questions:

(1) Should a multiple dwelling building which has accommodations for more than 10 persons in rooms which have no housekeeping, cooking and sanitation facilities—such as found in Family Units, be classed as a hotel regardless of which floor the rooms are located on, even though a part of the building is occupied as family units?

(2) Is it necessary to have more than (10) guests or lodgers above the second floor in order to require the Fire Alarm System?

It will be noted in the definition of a hotel, that the building or part thereof *is designed or used primarily* for sleeping accommodations for more than ten guests or lodgers. The word "primarily" is defined in Webster as: "In the first place; originally; pre-eminently; fundamentally." Primarily means basically or in such manner as to be of first importance. (In re Days Estate, 10 Fed. Supp. 229-231.)

You also state that your department has been enforcing the ordinance on the following basis:

"Any building which has sleeping accommodations for more than ten (10) guests or larger is classed as a Hotel regardless of any types of occupancy the building may contain, as this classification is considered by this Bureau as the most severe fire hazard (section 48-1)."

We think you misconstrue section 48-1. The last sentence of the last paragraph of that section reads: "Whenever there is any uncertainty as to the classification of the building, the *commissioner of buildings* shall fix the classification within which it falls according to the relative fire hazard involved." Apartment buildings and Hotels are in the same classification (Class A-2 Multiple Dwellings) and in a building containing apartments and rooms for guests or lodgers there is no occasion to invoke section 48-1. The only thing to determine in such a case is, for which purpose the building is designed or used primarily.

A three story multiple dwelling containing twenty apartments and five rooms for guests or lodgers on each floor is basically and predominately an apartment building and not a hotel. On the other hand if it contains twenty rooms for guests or lodgers and two apartments on each floor, the apartments should be considered as incidental to the primary purpose of the building which should be considered a hotel.

A building designed or used for two or more occupancies representing different occupancy classifications shall be classified as a mixed occupancy (Sec. 48-12.1).

Section 48-12.3 provides: When a building is occupied by two or more occupancies *not* included in one classification the provisions of this code applying to each use shall apply to such parts of the building as come within that classification.

Each occupancy in a building of mixed occupancy shall be wholly separated horizontally and vertically from any adjoining occupancy by construction materials providing fire resistance as established in Table 48-12.5.

So if a part of a building designed and used primarily for sleeping accommodations for more than ten guests or lodgers is in a building which contains offices or other business uses as provided in section 48-6 or 48-7, that part of the building used for such sleeping accommodations is a hotel and subject to all of the regulations of the code applicable to such use.

It is our opinion, in view of the foregoing, that the building you cite as an example is not subject to the Fire Alarm requirements.

MICROFILMING BUILDING DEPARTMENT RECORDS

(No. 11803—Special Deputy, Department of Buildings—R. G. S.—April 20, 1954.)

You asked our opinion as to the legality of microfilming records maintained by the Building Department and as to the length of time the original records must be kept before they may be destroyed.

Chapter 116 of the Illinois Revised Statutes, 1953, Paragraph 31, provides as follows:

"County or court officers may have their records copied on film—Quality of film. Any elected or appointed officer of any county, municipal corporation or political subdivision of the State of Illinois or the Clerk of any court may cause any or all public records, papers or documents in his custody or under his supervision to be photographed, micro-photographed or otherwise reproduced on film. The film shall comply with the minimum standards of quality approved for permanent photographic records by the National Bureau of Standards and the device used to reproduce the records on the film shall be one which accurately reproduced the content of the original. As amended by act approved July 11, 1951. L. 1951, p. 1377."

The foregoing statute was passed in 1943 to enable public officers to preserve a duplicate set of records as a war time security measure. It is clear from the provision that the authority you desire has been granted. In Section 32 of the same act it has been provided that all such microfilm reproductions shall be deemed to be original records for all purposes, including introduction in evidence in all courts or administrative agencies. A transcript, exemplification or certified copy of any such record shall be deemed to be a certified copy of the original for the above purposes.

Your second question is what length of time must the original records be retained after microfilm copies have been made. Section 33 provides, in part, as follows:

"Destruction of original records, whenever such reproductions are placed in conveniently accessible files and provision is made for preserving, examining and using the same, any such officer may authorize or provide for the destruction of his original records, papers or documents which have been on file for ten years. Original records, papers or documents created prior to 1870 may not be destroyed." * * *

Therefore, in answer to the second question it is to be noted that your records must be retained for ten years even though microfilm copies have been made.

The statute also provides a procedure to be followed by public officers before they are permitted to reduce official records to microfilm. This procedure is outlined in Section 34 as follows:

"List of documents copied to be filed. Any such officer or clerk of court before causing any records, papers or documents to be photographed, microphotographed or reproduced on film, as provided in Section 1 hereof, shall file with the county board of this county or with the city council, board of trustees or other governing body of the municipal corporation or political subdivision, as the case may be, a statement signed by him listing the records, papers and documents he desires to cause to be so photographed, microphotographed or otherwise reproduced on film and stating that, subject to the prior approval of the county board, or the city council or board of trustees, or other governing body of the municipal corporation or political subdivision, as the case may be, he proposes to cause the records, papers and documents so listed to be reproduced on film and subsequently destroyed. A copy of such statement shall be posted, in a public place in the office of the county, city or village clerk, or in the office of the governing body of the municipal corporation or political subdivision, as the case may be, and in the office of the officer or clerk of court signing such statement. The county board or the city council or board of trustees or other governing body of the municipal corporation or political subdivision, as the case may be, at any regular or special meeting held not less than thirty days after the filing and posting of such statement, shall consider said proposal and any objections thereto and may authorize the officer or clerk of court signing such statement to cause any of the records, papers and documents listed in the statement to be photographed, microphotographed or otherwise reproduced on film and to cause such records, papers and documents when so reproduced on film to be destroyed in accordance with the provisions of Section 3 hereof. As amended by act approved July 11, 1951. L. 1951, p. 1377."

As you will note, the conditions set forth in the statute to obtain permission to microfilm records require Council approval. When you determine the feasibility of proceeding with your plan to microfilm your records, this Department will assist you in the preparation of the necessary documents for presentation to the City Council.

UNIFORM FOR HOUSE OF CORRECTION OFFICERS

(No. 11812—Superintendent, House of Correction—E. R. H.—May 12, 1954.)

We acknowledge your letter of May 7, 1954, regarding uniforms for House of Correction officers. You state in your letter that "Mr. R. M. O'Brien, Chairman of the Board of Inspectors has raised the question whether or not it is permissible for the officers to wear their uniforms back and forth to work", and ask our opinion in regard thereto.

Section 2 of Chapter 67, Ill. Rev. Stats. (1953), State Bar Association edition, provides in part:

"The management and direction of any house of correction already established, or which may hereafter be established in any such city shall be under the control and authority of a board of inspectors" * * *

Section 3 of Chapter 67, Ill. Rev. Stats. (1953) provides in part:

"That whenever a board of inspectors have been organized as in section second of this act directed they shall have power and authority to establish and adopt rules for the regulation and discipline of the said house of correction for which they have respectively been appointed, * * * to make all such by-laws and ordinances in relation to the management and government thereof as they shall deem expedient" * * *

Section 4 of Chapter 67 provides in part:

"There shall be a meeting of the entire board, at the house of correction, once in every three months, when they shall freely examine into its management in every department, hear and determine all complaints, or questions not within the province of the superintendent to determine, and make such further rules and regulations for the good government of said house of correction as to them, shall seem proper and necessary." * * *

Section 24-2, Chapter 24, of the Municipal Code of Chicago, with reference to the house of correction, provides:

"The board of inspectors provided for by statute and appointed in accordance therewith shall have control of the house of correction and shall have the right to make all proper rules and regulations for the purpose of carrying out the provisions of this chapter."

It is our opinion that under the above statutory and code provisions, the Board of Inspectors of the House of Correction have full jurisdiction and ample power to establish rules and regulations with reference to uniforms of House of Correction officers and as to whether or not such officers be permitted to wear their uniforms back and forth to work.

CITY CLERK'S INDEX OF LICENSES

(No. 11842—City Clerk—A. F. G.—August 17, 1954.)

In your letter of August 11, 1954 you say:

"I have been contemplating discontinuing the keeping of an alphabetical index of all the general licenses issued by my office. In studying the duties of the City Clerk, I find that in addition to attesting all licenses, I must keep a record of the issuance thereof. This is done by retaining a carbon copy of the licenses issued, and this record is in numerical order. In instances where only a few licenses are issued for a particular business, the licenses are not written in duplicate, but a stub record is retained. This record is also in numerical order.

There is considerable expense involved in keeping an alphabetical index and in my opinion, the few instances this index is used, does not warrant the time and expenditure involved.

Under the new ordinance governing the registration of *Cigarette Vending Machines*, I am specifically ordered to keep an index record and I am not taking issue in that regard.

I shall appreciate it very much if you will render an opinion as to whether or not I am obliged to keep the aforementioned alphabetical index."

The Revised Cities and Villages Act in enumerating the powers and duties of the City Clerk is silent as to the manner he shall keep his records. Section 5-1 of the Municipal Code of Chicago merely provides that he shall keep a record of the issuance of licenses without direction as to the manner

the record shall be kept. The rule of law is that where a statute or ordinance directs that a thing be done in a particular manner, it may not be done in any other way. That is why you are correct in the case of the ordinance governing the registration of Cigarette Vending Machines in keeping your records in the manner provided by the ordinance. In the case of licenses generally where no direction is given you may exercise your discretion in the manner of keeping your records.

We call your attention to the Fraudulent Sales Act (Paragraphs 149 to 155, incl. Chapter 121½, Ill. Rev. Stats. 1953) which requires the City Clerk to issue licenses for the conduct of certain types of sales. Paragraph 151 of that chapter describes in detail how applications for these licenses shall be kept of record and suggest you follow the statute in keeping these records.

It is our opinion, therefore, that you are not required to keep your records of licenses in any particular manner unless the statutes or ordinances direct otherwise.

VOLUNTEER CIVIL DEFENSE WORKERS

(No. 11863—Director, Chicago Civil Defense Corps—A. F. G.—October 28, 1954.)

In your letter of October 26, 1954 you say :

"The Chicago Civil Defense Corps has scheduled A Civil Defense Emergency Mass Feeding Exercise for November 6th and 7th, 1954 at locations indicated in the attached Bulletin issued under date of October 15th.

The scope of the exercise is set forth in the above mentioned Bulletin. With few exceptions the people who will carry out the Exercise Will be volunteer workers for civil defense. Of course the visitors to whom food will be served will be citizens of Chicago and surrounding area.

An opinion is requested as to the liability of the Chicago Civil Defense Corps as an agency of the city for any injury to either the volunteer workers or the visitors to this training exercise happening in any of the several areas in which the exercise will be held."

At its session of 1951, the Legislature of the State of Illinois enacted an Act known and cited as "The Illinois Civil Defense Act of 1951", approved July 9, 1951 (Chap. 127, paragraphs 269-288, Ill. Rev. Stats. 1953). The Act was held valid in *People v. City of Chicago*, 413 Ill. 83.

"Civil Defense" as defined by the above mentioned Act (Sec. 271) "means the preparation for and the carrying out of such functions, other than functions for which military forces are primarily responsible, as may be necessary or proper to prevent, minimize, repair and alleviate injury and danger resulting from disasters caused by enemy attack, enemy sabotage or other hostile action."

Paragraph 279 of the above mentioned chapter states in regard to tort liability :

"Neither the State nor any political subdivision of the State, nor,

except in cases of negligence or wilful misconduct, the Governor, the Director, other agencies, or the agent, employees, or representatives of any of them, engaged in any Civil Defense activities, while complying with or attempting to comply with the provisions of this section or any rule or regulation promulgated pursuant to the provisions of this act, shall be liable for the death of or any injury to persons, or damage to property, as a result of such activities. The provisions of this section shall not, however, affect the right of any person to receive benefits to which he would otherwise be entitled under this act, or under the Workmen's Compensation Act, or under any pension law, nor the right of any such person to receive any benefits or compensation under any Act of Congress."

It is the general concept in tort law that one who undertakes to do an act or perform a service for another is bound to use reasonable care and skill in the performance thereof and is liable for failure in this respect even though the undertaking be purely voluntary.

The care to be exercised is reasonable, ordinary or due care which under the same or similar circumstances would ordinarily be exercised by a prudent person.

Moreover, the injury for which recovery could be sought must be the direct consequence of the wrong done. It must be the proximate and not the remote cause of the injury to make the cause actionable.

Therefore, the subject agencies participating in the exercise would be liable for any damage or injury caused (1) because of a failure to exercise reasonable or ordinary care, (2) where the injury complained of was the direct proximate result of such failure.

We do not believe that under the powers granted to the corporation counsel by Section 21-11 of the Revised Cities and Villages Act or under Section 6-2 of the Municipal Code of Chicago, the corporation counsel could defend volunteer workers or their employees against actions for damages growing out of their participation in these exercises, except where such defense is authorized by the city council.

TENURE OF RECREATION COMMISSIONERS

*(No. 11887—Director, Chicago Recreation Commission—J. C. M.—
March 21, 1955.)*

We acknowledge receipt of your letter dated March 16, 1954 wherein you inquire:

"Can you tell us whether our Commission members should consider themselves 'in office' until the new Mayor appoints his own Commission, or whether their appointments expire with the term of the present Mayor?"

The Citizens Recreation Commission was created by Mayor Kelly by letter transmitted to the City Council, dated March 21, 1934 (C. J. p. 1836). The number of members was not fixed nor were the duties defined. On November 28, 1949 Mayor Kennelly sent to the City Council a list of names of citizens to constitute the "Chicago Recreation Commission" (C. J. p. 4998).

In the appropriation ordinance for Year 1955, under Account 8 S 5 there was appropriated the sum of \$10.00 for operating expense of the Commission.

The Commission was not created by law or ordinance. There is no definite term for its existence or any members thereof. The Mayor can abolish it at any time. As noted above, the Citizens Recreation Committee was created by Mayor Kelly. In 1949 Mayor Kennelly, recognizing that "The untiring efforts of the Commission have resulted in coordinating the recreational activities of the Chicago Park District, the Board of Education and the City," appointed the complete membership effective January 1, 1950. Mayor Kennelly appointed a member of the Commission as late as December 9, 1954.

It appears to us that you should carry on until the next Mayor of Chicago has an opportunity to determine whether the Commission should continue to function.

ASSESSOR'S USE OF LICENSE RECORDS

(No. 11949—City Clerk—A. F. G.—September 5, 1955.)

In your letter of August 25, 1955, to which was attached a letter from Frank Keenan, Assessor of Cook County, you ask our opinion if you have authority to comply with Mr. Keenan's request. Mr. Keenan's letter reads as follows:

"In keeping with the practice of several years, will you kindly authorize us to use the 1955 Truck License Book for information to be used in the 1956 personal property assessment.

It takes us several months to prepare this information and it would facilitate work in this office at this time.

We will designate Mr. Johnson of the Photostat Department to pick up a book each afternoon and return it the following morning, so as not to inconvenience your office any more than is necessary.

Your cooperation in this matter will be greatly appreciated."

We find no provision in the Statute or in the City ordinance with respect to the powers and duties of the city clerk which prohibits you from complying with the assessor's request. It appears from his letter that your predecessor permitted for several years the copying of these records in the manner suggested in the letter. You may do likewise without violating any law, or you may refuse to do so.

Your office and that of the assessor are substantially under the same roof, the books can be moved without being taken out of the building, both of you are public officials, and it should be the policy of public officials to cooperate with one another in the public interest.

In view of the foregoing it is our opinion that the matter rests in your discretion.

INCOME TAX ON FISH AND GAME LICENSE FEES

(No. 12021—City Clerk—S. R. D.—March 9, 1956.)

Attached hereto is a photostatic copy of a letter from the U. S. Treasury Department in response to our letter of February 20, 1956, requesting a ruling as to whether you, as City Clerk of the City of Chicago, are required to include the income from the sale of hunting and fishing licenses in your 1955 income tax return.

You will note that the Acting District Director of the Internal Revenue Service has ruled that you must include the income from the sale of hunting and fishing licenses in your income tax return.

Section 51 of the Fish Code (Ill. Rev. Stat. 1955, chap. 56, par. 242) and Section 77.01 of the Game Code (Ill. Rev. Stat. 1955, chap. 61, par. 211.01) provide that you shall remit to the City Treasurer the fees you receive after deducting all of the costs and expenses incurred in issuing the licenses.

It is our opinion that any additional income tax you may be compelled to pay by reason of selling hunting and fishing licenses should be considered as a cost or expense incurred in issuing the licenses and be deducted from your remittance to the City Treasurer.

WEEK-END INCARCERATION AT HOUSE OF CORRECTION

(No. 12034—Warden, House of Correction—A. F. G.—April 24, 1956.)

In your letter of April 16, 1956 you say:

“Judge Kula has entered various orders covering ‘week end time’ in the House of Correction. These various orders have posed various legal questions, which the writer feels should be explained.

I have enumerated five (5) points that apply to the operation of the House of Correction in conflict with the question of week end cases. These I am spelling out on the attached sheet.

Inasmuch as this situation is imminent, will you please hasten the clarification so as to reassure the writer that he is acting on legal grounds.”

The attached sheet contained the following:

“(1) The court order specifies that a condition of probation is to serve a week end in the House of Correction. While it is incumbent upon the superintendent of the House of Correction to recognize this court order, the difficulty is apparent on the question of identification of the incoming prisoner.

(2) The statute specifies that 'persons so sentenced to be forthwith conveyed by some proper officer to said House of Correction.' Ch. 67-9 Illinois Revised Statutes.

(3) The rules of the House of Correction are to the effect that a day begins at 8 A.M. and ends at 4:30 P.M. These rules were established in line with Ch. 67-3 Illinois Revised Statutes.

Conflict arises between our rules and the convenience of the incoming prisoner named in these various orders.

(4) The statute provides that 'order of commitment may be modified within 30 days.' Ch. 67-9 Illinois Revised Statutes. These several incoming cases do not appear at this institution with 'order of Commitment.'

(5) The statute provides that 'order of commitment may be modified within 30 days' Ch. 67-9. These several orders constitute modification beyond the 30 day limit."
The form of order issued by the Court is substantially as follows:

That the defendant has been found guilty of non-support and has made application for probation;

It is ordered that the application for probation be sustained, and the defendant released for 1 year to the Chief Probation Officer on condition:

1. That the defendant give recognizance with or without surety for \$200. before being released.

2. That the defendant pay to Joseph L. Gill, Clerk of the Municipal Court of Chicago, the sum of \$25.00 each week for the said period of probation for the support and maintenance of the spouse or child or children of the defendant or both.

3. That the defendant report to the Warden of the House of Correction at 7 P.M. of every Friday during the said period of probation, there to remain until 6 A.M. of the succeeding Monday.

Cause continued to 19.. No warrant of commitment duly issued by the court to cause such person so sentenced to be forthwith conveyed by some proper officer to said House of Correction was given to the Warden, as required by Section 9 of the House of Correction Act, an Act entitled "An Act to authorize cities to establish houses of correction and farm colonies within the corporate limits and outside of corporate limits in the same county and authorizes the confinement of convicted persons therein" (Approved April 25, 1871).

The court order referred to above appears to be both an order of probation and a sentence. Condition No. 3 in the order in effect sentences the defendant to confinement in the House of Correction for 2½ days every week for the period of 1 year. There cannot be probation and imprisonment at the same time. If condition 3 be held not to be a sentence of imprisonment, it would have to be held to be a condition of probation. Paragraph 787 of Chapter 38 (Ill. Rev. Stats. 1955) enumerates the conditions that a court may impose in an order of probation, but nowhere in that section is the court authorized to impose a condition requiring the defendant to be confined in a penal institution. Probation and imprisonment are not compatible. In the *People v. Bardens*, 394 Ill. 511, 516 (1946) our Supreme Court, in discussing this matter said:

"In *Featherstone v. People*, 194 Ill. 325, this court observed, 'The punishment or penalty is fixed by the law defining and inhibiting the criminal act; the *sentence* is the final determination of the criminal

court,—the pronouncement by the judge of the penalty or punishment as the consequence to the defendant of the fact of his guilt.' In *People ex rel. Fullenwider v. Jenkins*, 322 Ill. 33, the court said: "'Sentence" is "a judgment or judicial declaration made by a judge in a cause. The term judgment is more usually applied to civil and sentence to criminal proceedings." (Citation.) Sentence denotes the action of a court of criminal jurisdiction declaring the consequences to a convict of the fact of guilt confessed or ascertained by a verdict.' Probation is a substitute for imprisonment. A primary purpose of the probation system is to give to defendants classified by the Probation Act, who have pleaded guilty or have been proved so, an opportunity for reformation, provided the trial court be satisfied there is reasonable ground to expect both that the defendant will be reformed and that the interests of society will be observed. (*People v. Donovan*, 376 Ill. 602; *People v. Miller*, 317 Ill. 33.) A sentence to imprisonment in the penitentiary cannot be synonymous with a grant of probation entitling a convicted defendant to escape a penalty of imprisonment. As pertinently pointed out in *Commonwealth v. Smith*, 130 Pa. S. 536, 198 Atl. 812, the court, in deciding that an order of probation is not a sentence, commented, "'It delays the sentence and may result in the release of the defendant at the end of the probationary period but until the conduct of the defendant has been such as to harmonize with the conditions of probation the sentence is in abeyance. And on failure to perform the conditions the defendant may be sentenced as provided in the act under which the indictment was drawn." It is nowhere in the act called, or referred to as, a sentence. * * * An examination of the provisions of section 1 of the Probation Act as amended, (citation), shows that the placing of the defendant on probation on such terms and conditions as the court may deem right and proper is regarded as a judgment, and the terms and conditions of probation are directed to be duly entered of record "as a part of the judgment in such case." But it is not a final judgment of sentence. * * * It is rather an interlocutory judgment, in the nature of a conditional order placing the defendant under the supervision and control of the court, in a system of tutelage designed for his reformation, (citations), to be followed by a final judgment of discharge, if the conditions of his probation are complied with (citation), or by a final judgment of sentence on his being brought before the court following a violation of the terms of his probation.'"

The Warden of the House of Correction is not a probation officer under the Probation Act. Probation officers are appointed by the Circuit Court and a probationary officer appointed by County Court was not even a *de facto* officer, but was a stranger to whom the statute did not authorize the county court to commit the defendant (*People v. Huyvaert*, 209 Ill. App. 40).

We are of the opinion that the order of the court directing the Warden of the House of Correction to imprison for 2½ days a week, a person whom the same court has placed on probation is of doubtful validity. We are advised that the State's Attorney of Cook County, in an informal opinion, has held the imprisonment invalid and has so advised the Sheriff.

We suggest you request the court to furnish a separate order of commitment for each prisoner for each week-end incarceration and to have the prisoner conveyed to the House of Correction by some proper officer as provided by section 9 of the House of Correction Act, so that you can properly identify the person to be imprisoned.

CITY CLERK—MICROFILMING RECORDS

(No. 12038—City Clerk—M. G. S.—May 2, 1956.)

In response to your letter of April 17, 1956, in which you request the authority to destroy original documents after they have been microfilmed, I wish to advise that Chapter 116, Section 31 of the Illinois Revised Statutes which gives you the authority to microfilm all official documents states as follows:

"Any elected or appointed officer of any county, municipal corporation or political subdivision of the State of Illinois or the clerk of any court may cause any or all public records, papers or documents in his custody or under his supervision to be photographed, microphotographed or otherwise reproduced on film. * * *

Chapter 116, Section 33 of the Illinois Revised Statutes states as follows:

"Whenever such reproductions are placed in conveniently accessible files and provision is made for preserving, examining and using the same, any such officer may authorize or provide for the destruction of his original records, papers, or documents which have been on file for ten years. Original records, papers or documents created prior to 1870 may not be destroyed. * * *

Chapter 116, Section 34 of the Illinois Revised Statutes states as follows:

"Any such officer or clerk of court before causing any records, papers or documents to be photographed, microphotographed or reproduced on film, as provided in Section 1 hereof, shall file with the county board of his county or with the city council, board of trustees or other governing body of the municipal corporation or political subdivision, as the case may be, a statement signed by him listing the records, papers and documents he desires to cause to be so photographed, microphotographed or otherwise reproduced on film and stating that he proposes to cause the records, papers and documents so listed to be reproduced on film and subsequently destroyed. A copy of such statement shall be posted, in a public place in the office of the county, city or village clerk, or in the office of the governing body of the municipal corporation or political subdivision, as the case may be, and in the office of the officer or clerk of court signing such statement. The county board, or the city council or board of trustees or other governing body of the municipal corporation or political subdivision, as the case may be, at any regular or special meeting held not less than thirty days after the filing and posting of such statement, shall consider said proposal and any objections thereto. Unless the county board, or the city council or board of trustees or other governing body of the municipal corporation or political subdivision, as the case may be, orders within ninety days of the filing and posting of such statement, that the records, papers and documents so listed, or any of them, shall be preserved, the officer or clerk of court signing such statement may, after such ninety day period, cause any of the records, papers and documents listed in the statement to be photographed, microphotographed or otherwise reproduced on film and to cause such records, papers and documents when so reproduced on film to be destroyed in accordance with the provisions of Section 3 hereof. Provided, that any records, papers or documents so ordered to be preserved shall not be destroyed unless included in a statement subsequently posted and filed in the same manner with the county board, or the city council or board of trustees, or other governing body of the municipal corporation or political subdivision, as the case may be, without any further order of preservation being entered within ninety days of the filing and posting of such subsequent statement. As amended by act approved July 11, 1955 * * *"

In view of the above it is my opinion that you have the authority to destroy all original documents which have been on file for more than ten years and which have been executed subsequent to the year 1870 providing you take the following steps:

- (a) You must file with the City Council a statement signed by you listing the records, papers and documents which you desire to microfilm.
- (b) You must post a copy of such statement in a public place in your office for a period of thirty days.
- (c) You must obtain approval from the City Council to microfilm the records, papers and documents which you have listed on the statement submitted to them. The City Council has ninety days from the filing and posting of this statement to request any of the listed documents to be preserved.
- (d) After the City Council grants you approval you must wait a period of ninety days during which time the City Council may request you to preserve any document.
- (e) After the ninety day period referred to above has elapsed you may then photograph, micrograph or otherwise reproduce on film the records, papers and documents which you have listed in your statement previously submitted to the City Council, and after such reproductions are placed in conveniently accessible files and provisions made for preserving, examining and using the same, you are then authorized to destroy the original records.

COMPTROLLER TO ACT IN LIEU OF TREASURER

(No. 12042—City Comptroller—J. C. M.—June 11, 1956.)

In your letter of June 11, 1956 you refer to a resolution that was passed by the City Council on August 4, 1955 relative to the deposit of securities purchased from the proceeds of the sale of the Calumet Skyway Toll Bridge Revenue Bonds with the Federal Reserve Bank of Chicago to be released "from safekeeping, delivered, sold, redeemed, exchanged or otherwise disposed of upon instructions signed by the City Comptroller or Deputy City Comptroller and the City Treasurer or Deputy City Treasurer." You also advise that some of these securities are maturing on Thursday, June 14, 1956 and that the City Treasurer is not available for the purpose of executing instructions. You further advise that the City Treasurer has not appointed a deputy city treasurer. You further inquire as to the applicability of Section 7-49.1 of the Municipal Code of Chicago.

Section 7-49.1 reads as follows:

"Authority of comptroller in case of vacancy in office or incapacity of city treasurer.) If a vacancy exists in the office of city treasurer or the treasurer is absent from the city or otherwise incapacitated to perform his duties the comptroller and the Mayor or either of them alone shall have authority to perform the functions of the comptroller and treasurer jointly in the purchase, repurchase, sale or resale of any securities or the investment of city funds as provided in Sections 7-41 to 7-49, inclusive."

The provisions of the Municipal Code of Chicago are controlling over any resolution passed by the City Council where the resolution pertains to a matter that could affect the people of Chicago generally. While the resolu-

tion pertains to a specific deposit with the Federal Reserve Bank of Chicago, the matter of handling said securities and having such securities available for redemption upon payment date concerns all of the people of Chicago.

We are of the opinion that in view of the inability of the City Treasurer to perform the functions provided for in the resolution of August 4, 1955, you are authorized, under the provisions of the Code, to perform said functions of the City Treasurer required by virtue of the securities deposited for safekeeping with the Federal Reserve Bank of Chicago and that upon your signature the bank should release from said safekeeping said securities so that the duties that should be performed are performed.

We are further of the opinion that the release of such securities by the Federal Reserve Bank of Chicago upon receipt of the City Comptroller as such and acting for the City Treasurer in his absence, as provided by Section 7-49.1, will create no liability upon the Federal Reserve Bank of Chicago.

We are further of the opinion that the Comptroller may direct the investment of the proceeds from the redemption of said funds in the absence of the City Treasurer.

TREES ON PRIVATE PROPERTY

(No. 12044—Alderman, 8th Ward—R. N.—June 12, 1956.)

In reply to your inquiry of May 28, 1956 as to the validity of a proposed ordinance to (1) require owners of property to remove dead trees which endanger passersby on public ways, (2) authorize the removal by the city of dead, dangerous or diseased trees from private property upon failure of the property owner so to do, and (3) charge the expense of such removal by the city against the owner of the property, we submit the following:

Section 32-5 of the Municipal Code of Chicago provides:

"The owner of any lot or parcel of land in the city upon which any tree may be standing adjacent to any public way shall trim or cause to be trimmed to a clear height of ten feet above the surface of said public way all branches thereof which overhang such public way or obstruct or interfere with the passage of light from any street lighting system.

Said owner shall remove from such tree all dead, decayed or broken limbs and branches that overhang the public way and when any such tree is dead the owner shall remove the same."

The language of the foregoing section is clear—the burden is squarely on the property owner.

Section 32-18 provides for enforcement of section 32-5 by the city forester, prosecuted in the name of the city. Section 32-19 imposes a fine of from \$5 to \$100 for violation.

The municipality is responsible for the safety of the public ways of the city. Means to accomplish this end would include such reasonable regulation of the use of abutting private property as would be necessary to insure the safety of persons using the adjoining public ways. Section 32-5 quoted above is such a regulation. Similar instances may be found in the requirement for the fencing of excavations on private property (Code: 193-15), the prohibition of the use of barbed wire within six feet of the surface of public ways (Code: 36-38), etc.

It would be within the power of the city council to broaden the provisions of sections 32-5 quoted above and 32-18 to provide for the removal of such dangerous trees by the city in case of failure by the property owner to do so, after notice, within a specified time, the cost thereof to be chargeable to the property owner. In the absence of statutory authority constituting such charges a lien against the property, as is granted the city in such cases as weed destruction and rat control (Revised Cities and Villages Act, secs. 23-113 and 23-109), the cost incurred by the city would be recoverable in an action at law against the property owner.

We shall be glad to discuss with you the preparation of such amendments to the Code as will be necessary to accomplish this end, if you so desire.

LAND ACQUISITION IN CONSERVATION AREA

(No. 12091—Commissioner, Community Conservation Board—M.I.W.
—December 11, 1956.)

I.

You have relayed to us a request from the Housing and House Finance Agency of the United States for an opinion from this office as to whether the Community Conservation Board of the City of Chicago has the legal authority to carry out all of the final planning activities contemplated in connection with the Hyde Park-Kenwood Conservation-Urban Renewal Project.

You have advised us that the final planning activities contemplated will produce what is known as a "conservation plan" under the Illinois-Urban Community Conservation Act, as amended (par. 91.1-91.16, chap. 67½, Ill. Rev. Stat. 1955).

Section 5 of said act authorized the Conservation Board, after designation of a conservation area, to prepare or have prepared for it a plan:

"* * * which plan may include but is not limited to (1) *land uses, residential or non-residential*; (2) *improvement, alteration, or vacation of major and minor streets and alleys, provision for restricted service access and off street parking*; (3) *locations and easements for public utilities*; (4) *community facilities*; (5) *landscaping and site engineering*; (6) *building restrictions*; (7) *recommended construction including new buildings, rehabilitation and conversions, demolition of designated structures, and elimination of non-conforming uses*; (8) *population density, ground coverage, and number of dwelling units recommended*; (9) *recommended standards of maintenance, and requirements of applicable health and safety ordinances*; (10) *zoning and/or re-zoning required*; (11) *costs and financing arrangements of public portions of the plan*; (12) *recommended time table of various stages of the program*; (13) *any and all other steps needed to carry out the plan.*" (emphasis supplied.)

We have examined the requirements for the contents of the final planning activities as described in section 4 of the Local Public Agency Letter Number 45 issued by the Urban Renewal Administration and are of the opinion that the provisions of Section 5 are broad enough to permit the Conservation Board to carry out the final planning activities enumerated therein.

II.

You have also requested our specific comment as to whether the Community Conservation Board may propose, plan and undertake the clearance of land within a conservation area.

Section 6 of the Act reads in part as follows:

"The Conservation Board of a municipality shall have the power to acquire by purchase, condemnation or otherwise any *improved or unimproved real property the acquisition of which is necessary or appropriate for the implementation of a conservation plan for a conservation area defined herein; remove or demolish substandard or other buildings and structures from the property so acquired;*" (emphasis added.)

In an opinion directed to you dated April 4, 1956, after citing the above excerpt from the Act, we stated as follows:

"There is no limitation in the Act as to the amount or percentage of any conservation area which may be acquired and the structures on which may be removed. The test is only whether the taking and demolition is, in the language of the Act, 'necessary or appropriate for the implementation of a conservation plan'."

We then pointed to that part of Section 5 of the Act (which we have quoted above) and underlined specific phrases, as we have again done above. We then continued with the following language:

"We have underlined in the above excerpt from the Act those elements which may be included in a conservation plan which clearly bespeak the intention of the Legislature that a plan might well include certain proposals involving clearance of land within the area; this coupled with the grant of power to acquire property and demolish improvements thereon described above provides a clear answer to your question."

Based on the foregoing, it was then our opinion, as it is now, that the Community Conservation Board is empowered to propose a conservation plan which contemplated land clearance as part of such plan and that it may upon obtaining as provided by the governing statute, the approval of the City Council and the Community Conservation Council appointed for the area by the Mayor, proceed to carry out such a progress.

III.

We have been asked to direct this opinion to that part of the present stage of planning which tentatively calls for substantial clearance of four sites within the designated conservation area consisting of 60.24 acres, 21.08 acres, 4.68 acres and 3.12 acres respectively, totalling 89.12 acres in all out of a total acreage within the conservation area of 909.4. The question you inform us as having been raised by the federal government is whether in the event those individual sites qualify as a "slum and blighted area" as defined in the Blighted Areas Redevelopment Act of 1947, as amended (Par. 63-91, Chap. 67½, Ill. Rev. Stat. 1955), the authority of the Conservation Board to proceed in connection with such areas would be affected.

Section 3 of the Urban Community Conservation Act defines a conservation area in which a conservation board is authorized to exercise its planning, land acquisition and demolition powers, as follows:

"'Conservation Area' shall mean an area of not less than 160 acres in which the structures in 50% or more of the area are residential having an average age of thirty-five years or more. *Such an area is not yet a slum or blighted area as defined in the Blighted Areas Redevelopment Act of 1947, but such area* by reason of dilapidation, obsolescence, deterioration or illegal use of individual structures, overcrowding of structures and community facilities, conversion of residential units into non-residential use, deleterious land use or layout, decline of physical

maintenance, lack of community planning, or any combination of these factors *may become such a slum and blighted area.*" (emphasis added.)

The "Blighted Areas Act" defines a slum and blighted area as:

"* * * any area of not less in the aggregate than two (2) acres located within the territorial limits of a municipality where buildings or improvements, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or layout or any combination of these factors are detrimental to the public safety, health, morals or welfare."

The question is whether in defining a Conservation Area the Legislature in saying "such an area" is not yet slum and blight was referring to the conservation area *as a whole* or meant that *no part* of such an area is a slum and blighted area as defined.

The word "area" appears in the first sentence of the paragraph in question and describes general qualifications for the area as a whole. The next immediate sentence contains the words "such an area is not yet * * *," etc., and the proximity of that term to the first sentence strongly suggests that these words refer to the area as a whole.

The practical consequence of an interpretation which would change the words "such an area is not" to "no part of such an area is not" would require the Conservation Board to subject any area contemplated by it for designation to a process by which there would have to be superimposed across the face of each part of such 160 acre or more area every conceivable shape a two acre more or less contiguous plot might take. The variety of such possible shapes approximate infinity. Conditions which were found in each such outlined area would have to be examined to see whether such smaller area was "slum and blight." Such a determination is fraught with difficulty when made in relation to only one area, since, as stated by the Illinois Supreme Court in *People ex rel. Gutknecht v. City of Chicago, et al.*, 3 Ill. 2d 539 (1954):

"Specific degrees of deterioration or dilapidation, precise percentages of obsolescence, or mathematical measurements or the extent of overcrowding of residences and of schools and other community facilities which indicate imminent deterioration cannot be stated, for the combination which will produce the condition at which the legislation is aimed are highly variable."

Though the Court was speaking of the Conservative Act, its reasoning applies with identical force to determining whether an area is slum or blight.

The endless repetition of the process it would be necessary to go through if the Legislature had in fact used the words "*no part* of such an area" could well render the Conservation Act unworkable.

A further impractical consequence of reading such an interpretation into the language under consideration would be to render the Conservation Board incapable of treating in an orderly and uniformly planned fashion the conditions found in a conservation area. Such areas, being of a minimum size of 160 acres, tend to embrace entire neighborhoods. Unless the land Clearance Commission, a separate municipal corporation, which is granted jurisdiction over slum and blighted areas in the Blighted Areas Act of 1947 referred to above, was ready, able and willing to assume responsibility for such two acre or more pockets of blight within a Conservation Area at such time as to fit in with the larger program of the Conservation Board, the Board would be limited to dealing with every problem in an area except the most serious cancerous pockets of blight eating away at the health and stability of the area as a whole.

We do not believe the language used in the Act should be strained to require a meaning leading to such impractical consequences.

It is therefore our opinion that the phrase "such an area" means the area as a whole. So long as the area as a whole is a conservation area as defined and the area as a whole is not a slum and blighted area, the Conservation Board has authority to plan for and exercise its powers in the entire area under consideration, even though there are found within the area four slum and blighted areas referred to above constituting approximately ten per cent of the total acreage.

The practical result is thus that a two acre pocket of blight within a conservation area may be treated by both the Conservation Board and the Land Clearance Commission. The situation of concurrent jurisdiction poses no problem.

In *People ex rel. Touhy v. City of Chicago*, 399 Ill. 540, the Illinois Supreme Court rejected the argument that the Blighted Areas Redevelopment Act of 1947 was void because it attempted to vest in Land Clearance Commissions slum clearance powers coextensive with those already held by the City of Chicago for the same purpose. The Court said at page 557:

"* * * this court has recognized that, in our complex system of government, different public authorities exercise within parts of the same territory practically similar powers. (*Powers v. Bartholf*, 388 Ill. 445; *People ex rel. Darnell v. Woodward*, 285 Ill. 165; *Wilson v. Board of Trustees of Sanitary District*, 133 Ill. 443.) It was said in the *Bartholf* case, on page 466 that: 'This power and authority must be exercised in a particular way by these different public authorities so as not to bring different municipalities into conflict in doing the same identical work for the same sections.' It is true that the Land Clearance Commission is given powers to promote slum clearance by the Blighted Areas Act, which are similar to the powers given to the City of Chicago by the Revised Cities and Villages Act. (Ill. Rev. Stat. 1947; chap. 24, pars. 23-1 *et seq.*), and the areas of their jurisdiction are coterminous, however, the sites in which the Land Clearance Commissioners are to operate must be approved by the City Council of Chicago and by the State Housing Board. It is inconceivable that both corporations would enter into a program of slum clearance by which one would be duplicating the work of the other. There is no duplication of taxes in the area, and a reasonable application of both acts will eliminate duplication of effort by the two municipalities. We are of the opinion that the Blighted Areas Act is not subject to this objection of appellant."

The conclusion stated in the *Touhy* case eliminates any question which might arise because of concurrent jurisdiction in the same area as between the Land Clearance Commission and the Community Conservation Board as an agency of the City of Chicago.

CUSTODY OF TEACHERS' PENSION FUND

(No. 12101—City Treasurer—G. F. M.—January 15, 1957.)

In response to your request for an opinion concerning the Board of Trustees of the Public School Teachers' Pension and Retirement Fund taking over the servicing and custody of its investments, the following is submitted.

Your letter states that the Board of Trustees of the Teachers' Pension and Retirement Fund is going to consider the advisability of taking over the custody and servicing of the fund's investment; that apparently the proposed change would involve renting vault space in a bank where the employees of the fund would service the fund's investments; and that you request an opinion as to the legality of such proposal.

Section 34-108 of the Act governing the Public School Teachers' Pension and Retirement Fund (Ill. Rev. Stats. 1955, Chap. 122, Sec. 34-108) provides, in part thereof, as follows:

"The City Treasurer, ex-officio, shall be the custodian of the fund, and shall secure and safely keep it, subject to the control and direction of the Board of Trustees. He shall keep his books and accounts concerning the fund in the manner prescribed by the Board. * * * The City Treasurer shall be liable on his official bond for the proper performance of his duties and the conservation of the fund."

It is to be noted that the Act governing the fund provides "The City Treasurer shall be custodian of the fund." Even though such treasurer "shall secure and safely keep it, subject to the control of the Board of Trustees," the law does not contemplate nor permit the Board of Trustees to act as the custodian of the fund, nor does it permit the Board of Trustees to designate anyone else to be such custodian. Should you as City Treasurer permit a change of custody of the fund, you would immediately become liable on your official bond by reason of your failure to perform your duties.

We are, therefore, of the opinion that the Board of Trustees of the Public School Teachers' Pension and Retirement Fund has no legal authority to take over the custody of the fund's bonds and investments.

OUT OF TOWN CABS

(No. 12155—Public Vehicle License Commissioner—J. F. G.—August 15, 1957.)

Your letter of August 9, 1957, states that Majestic Cab Company, said to be licensed to do business in a northern suburb, operates taxicabs from a gasoline station located at the northwest corner of Peterson and Kimball; that drivers of these cabs have been arrested several times by police assigned to your Commission, for picking up passengers in the city for transportation from place to place within the city in violation of Sections 28-2 and 28-3 of the code; that these cabs are parked on the property of the filling station where it is believed a radio service is maintained to communicate with the cabs of the company.

You question your authority for control of the operation of a radio communication service or of the parking of the cabs on private property within the city and request that we reply to Alderman Simon regarding these two phases of their operation.

Section 28-3 provides that public passenger vehicles not licensed by the city must have a white card bearing the words "Not For Hire" displayed on the windshield of the vehicle while it is in the city and no roof light or other special light may be used to indicate that the vehicle is vacant or subject to hire. If such vehicle is parked in the city, whether on private property or on the public ways, it must comply with the foregoing provision, subject to the penalty of arrest and fine of not less than \$50.00 nor more than \$200.00 for each offense.

Another provision in Section 28-3 prohibits any person from soliciting passengers for such vehicle while it is in the city. The solicitor need not be the driver or operator of the vehicle. Hence, the person operating the radio communication system, if any, inviting calls for cab service and broadcasting such calls to the vehicles of the cab company is also subject to arrest and fine under this section.

We return herewith communication from the Mayor's office together with the letter from Alderman Simon addressed to the Mayor and suggest that you investigate the facts to determine whether there is any violation of Section 28-3 as herein construed and report to the Mayor as requested.

MICROFILMING OF BONDS, VOUCHERS AND WARRANTS

(No. 12157—City Comptroller—A. F. G.—August 23, 1957.)

Your letter of July 18, 1957 is as follows:

"At the City warehouse at Thirty-first and Sacramento, the City Comptroller has 3,892 boxes of vouchers and warrants dating from 1871 to 1944. There are approximately twenty-five carloads of material in these boxes.

The cancelled warrants are similar to the sample enclosed. They are the evidences of payment. The vouchers contain the supporting papers for the warrants including invoices and a voucher to which the invoices are attached.

Will you please advise:

1. Is it necessary to photostat both the warrants and the vouchers before they are destroyed or is it sufficient to photostat the warrants only?
2. Is it necessary to photostat either the vouchers or warrants before they are destroyed?

In the same warehouse we have 402 boxes of cancelled bonds. It is obvious that these should not be photostated since thousands of them are identical. No purpose would be served by photostating them. I can see no reason whatsoever for keeping the bonds or doing anything else with them.

Will you kindly advise if I may destroy without further action the cancelled bonds described above. If you should decide that further authority is necessary before the destruction of the bonds, is Council approval required or sufficient?"

No City officer elected or appointed has authority to destroy public records, papers or documents except in the manner and to the extent provided by statute. The statute which authorizes City officers to destroy records is entitled, "An Act in relation to the reproduction on film of public records of counties, municipal corporations, political subdivisions and courts, and the destruction of the original records so reproduced" approved July 16, 1943, as amended. This Act consists of four sections and appears as chapter 116 paragraphs 31 to 34 inclusive, Ill. Rev. Stats. 1955.

Section 1 of that Act provides that elected or appointed officers of any municipality may cause any or all public records, papers or documents in his custody or under his supervision to be photographed, microfilmed or otherwise reproduced on film.

Section 2 provides that any such reproduction shall be deemed to be an original record for all purposes, including introduction in evidence in all courts or administrative agencies; that a transcript, exemplification or certified copy thereof, shall be deemed to be a transcript, exemplification or certified copy of the original.

Section 3 provides that, "whenever such reproductions are placed in conveniently accessible files and provision is made for preserving, examining

and using the same, any such officer may authorize or provide for the destruction of his original records, papers or documents which have been on file for ten years. Original records, papers or documents created prior to 1870 may not be destroyed * * *."

Section 4 of the Act provides the procedure to be followed and reads as follows:

"Section 4. Any such officer or clerk of court before causing any records, papers or documents to be photographed, microphotographed or reproduced on film, as provided in Section 1 hereof, shall file with the county board of his county or with the city council, board of trustees or other governing body of the municipal subdivision, as the case may be, a statement signed by him listing the records, papers and documents he desires to cause to be so photographed, microphotographed or otherwise reproduced on film and stating that he proposes to cause the records, papers and documents so listed to be reproduced on film and subsequently destroyed. A copy of such statement shall be posted, in a public place in the office of the county, city or village clerk, or in the office of the governing body of the municipal corporation or political subdivision, as the case may be, and in the office of the officer or clerk of court signing such statement. The county board, or the city council or board of trustees or other governing body of the municipal corporation or political subdivision, as the case may be, at any regular or special meeting held not less than thirty days after the filing and posting of such statement, shall consider such proposal and any objections thereto. Unless the county board, or the city council or board of trustees or other governing body of the municipal corporation or political subdivision, as the case may be, orders within ninety days of the filing and posting of such statement, that the records, papers and documents so listed, or any of them, shall be preserved, the officer or clerk of court signing such statement may, after such ninety day period, cause any of the records, papers and documents listed in the statement to be photographed, microphotographed or otherwise reproduced on film and to cause such records, papers and documents when so reproduced on film to be destroyed in accordance with the provisions of Section 3 hereof. Provided, that any records, papers or documents so ordered to be preserved shall not be destroyed unless included in a statement subsequently posted and filed in the same manner with the county board, or the city council or board of trustees, or other governing body of the municipal corporation or political subdivision, as the case may be, without any further order of preservation being entered within ninety days of the filing and posting of such subsequent statement."

In answer to your question 2, we are of the opinion from the provision of the above quoted section 4, that before you destroy the original records that you should photostat either the vouchers or the warrants. If, in your opinion, the photostating of both the voucher and the warrant is necessary to make a complete record of the transaction, then we are of the opinion this should be done. The sample you attached to your letter shows the receipt of the payee on both the voucher and warrant so that perhaps the photostat of one or the other would constitute a proper record. If you determine that only one of the documents should be preserved on film, then only one should be listed in the statement you make to the city council as provided in section 4.

With respect to the cancelled bonds referred to in the last two paragraphs of your letter, it is our opinion in view of the procedure outlined in section 4 of the statute you would be required if the city council, authorizes their destruction, to have them microfilmed before proceeding with the direction of the city council.

Perhaps the statute should be so amended as to exempt from its provisions the filming of records, such as you point out in the case of the cancelled bonds, which serve no useful purpose.

PARTY AFFILIATION OF CONSERVATION BOARD MEMBERS

(No. 12179—Committee on Planning & Housing—J. C. M.—November 18, 1957.)

In your letter of November 6, 1957 you request an opinion as to the determination of the qualifications of appointees as members of the Urban Conservation Commission.

Chapter 67½, Paragraph 91.11, Illinois Revised Statutes, 1957, sets forth the qualifications of the members of the Conservation Board, involved in your inquiry, as follows:

“Not more than three (members) of whom shall belong to the same political party.”

There are presently only two qualified political parties, Republican and Democratic, as defined by Chapter 46, Paragraph 7-2, Illinois Revised Statutes, 1957, (Election Code).

One way to determine a person's party affiliation is to look into his qualifications to vote in a primary election. Chapter 46, Paragraph 7-43 provides *inter alia*:

“No person shall be entitled to vote at a primary :

(a) Unless he declares his party affiliations as required by this Article;

(b) Who shall have signed the petition for nomination of a candidate of any party with which he does not affiliate when such candidate is to be voted for at the primary;

(c) Who shall have signed the nominating papers of an independent candidate for any office for which office candidates for nomination are to be voted for at such primary;

(d) If he shall have voted after January 1, 1939 at a primary held under Article 7 of another political party within a period of twenty-three calendar months in which such primary is held.”

It follows that if a person has voted at a primary and declared his party affiliation, such public declaration is binding upon him should he vote in a general primary election within two years.

A political party is a voluntary association of voters who are desirous of promoting a common political philosophy or public policy (*People v. Kramer*, 328 Ill. 516). A political party being a voluntary association of individuals, a person may withdraw from one political party and affiliate with another at any time. Of course, he may be restricted during the two-year period indicated above in again voting at a general primary election.

The problem is focused in stronger language in Chapter 46, Paragraph 6-22 as to qualifications of election commissioners :

“Two of such commissioners at least shall always be selected from the two leading political parties of the state, one from each of such parties, and all shall be legal voters and householders residing in such city, village or incorporated town, and be *men of well-known political convictions* and of approved integrity and capacity. No commissioner can hold any other public office. Whenever it shall come to the knowledge of such judge of the County Court that one of the leading political parties

of the state is not represented upon such commission by a person of the same political faith, he shall at once remove one of such commissioners and fill the vacancy with a member of the leading political party not so represented."

Note the language:—"and be *men of well-known political convictions*" used in that section. Also note the provision of disqualification after appointment in the event a member "loses his political faith", so that one of the principal parties has no representation thereon. There is no forfeiture provision in Paragraph 91.11 set forth above.

Interpretation of a somewhat similar statutory provision was made by the Attorney General in his opinions of 1928 (p. 181). There, the statute provided:

"The Board of Review shall, at all times, consist of two members affiliated with the political party holding the highest vote and one member of the party holding the second highest vote at the general election in the county, prior to the time any appointment is made, by virtue of said section."

The question posed was whether a prospective appointee to the Board was a Republican or a Democrat. He had at all times voted the Democratic ticket except at the prior general primary election at which time he voted the Republican ticket. After considering the provisions of Section 43 of the Primary Act (set forth above), and Section 44, the author of the opinion states:

"The person in question having voted at the April 10th primary and his vote not having been challenged, the regulations prescribed in said Section 43 of the Primary Act in relation to the qualification of voters were apparently complied with. It is evident that said voter publicly declared his affiliation with the Republican party in accordance with said Section 44 quoted above. This declaration is binding upon said voter, should he vote in a general primary election within two years. * * *"

While party affiliations are matters of fact, if a person makes a public declaration of his political party affiliation in pursuance of a requirement of statute, it will be presumed that the person making such declaration is making a truthful statement of his present party affiliation. * * * it is my opinion that if the person you refer to is appointed a member of the Board of Review, it must be presumed in the absence of positive proof to the contrary, that his present political affiliation is with the Republican party."

Such presumption, of course, would extend only during the two-year primary election law period. If a person has not voted in a primary and is not a man "of well-known political convictions", his statement of his present political affiliation should suffice unless clear proof to the contrary is produced. Holding a position as a member of a state central committee, congressional committee for a county, county central committee, municipal central committee, ward committeeman or delegate to a national convention or either of the political parties would indicate "well-known political convictions".

It should be noted further that the language used in Paragraph 91.11 does not require the members of the Board to be qualified Republicans or Democrats. The provision is merely a directory to the appointing authority that not more than three members of the Board shall belong to the same political party. In *People v. Hoffman*, 116 Ill. 587, 605, the court said:—"The direction to select from the two leading political parties is a rule for guidance of the appointing officer and imposes no act or exaction upon the officer appointed". In some states, such statutory provisions have been held to be unconstitutional (140 A.L.R. 473). There is no provision for the forfeiture of the office in the event it should occur during their tenure that more than three members belonged to the same political party as is present in the statutory provisions relating to the membership of the Board of Election Commissioners.

The formal action of the Urban Conservation Board would not be imperiled, in our opinion, even though there were more than three members of a political party on the Board (Section 8-12, Rhyne on Municipal Law, p. 143). Nor does the statute require that appointees to the Board be members of a political party. They can be independents. They must be qualified electors and residents of the municipality (Chap. 24, par. 9-87).

We are not advised by your letter nor were we present during the entire hearing of your Committee held on November 5, 1957 as to the party affiliation, if any, of the recent appointee to the Board. We recall that he stated that at the time his brother, who was a judge, was living and a candidate for public office, he voted Democratic in the general primaries. Such political affiliation took place more than two years ago so that there can be no presumptions therefrom. He further stated that he voted for the Republican candidate for President during the past two presidential elections. That action did not necessarily make him a Republican as such declarations were not made by reason of any statutory requirement nor are any of the elements set forth in Chapter 46, Paragraph 7-43 present in making these declarations.

He further stated he considered himself to be an independent voter. Under the circumstances, as we review them, and assuming that there are presently three members of the Board belonging to the same political party, we are of the opinion that the Mayor's appointment is within the law.

RELOCATION OF PERSONS

(No. 12225—Community Conservation Board—M. C. H.—May 19, 1958.)

This is to acknowledge the receipt of a copy of a letter addressed to you from John P. McCollum, Regional Administrator, in which an opinion is requested from the Corporation Counsel upon the following questions:

"(1) Under Section 7A of the Illinois Urban Community Conservation Act (Chapter 67½, Illinois Revised Statutes 1957, Section 91.14a) is it the opinion of the Corporation Counsel that the Community Conservation Board in planning, undertaking or the carrying out of a Conservation Plan may enter into an agreement with the Neighborhood Redevelopment Commission of Chicago whereby a Neighborhood Redevelopment Corporation and the Neighborhood Redevelopment Commission would be obligated to perform as the agent of the Community Conservation Board the relocation functions and responsibilities of the Community Conservation Board in accordance with the approved relocation plan?

(2) Is there any legal objection to the Neighborhood Redevelopment Commission vesting in the Community Conservation Board pursuant to an agreement or arrangement mentioned in question (1) above the responsibility for compliance with the Government's requirements?"

It is the opinion of the Corporation Counsel that the answer to question (1) is in the affirmative. Section 7A, referred to in question (1), gives very broad powers to the Conservation Board, which would be sufficient to cover the obligations with respect to relocation referred to in the question.

In answer to question (2), it is the opinion of the Corporation Counsel that there is no legal objection to the Neighborhood Redevelopment Commission vesting in the Community Conservation Board under the agreement mentioned, responsibility for compliance with the Government's requirements, insofar as the relocation of persons only is involved.

PUBLIC LIBRARY TORT LIABILITY

(No. 12231—Chicago Public Library—C. P. H.—June 13, 1958.)

We have your letter requesting our opinion with reference to the tort liability of the Chicago Public Library and its employees in connection with the operation and maintenance of the Library. We will consider the questions in the order in which they appear in your communication.

1. "Is the Library liable for torts?"

Under Section 1 of the Library Act of 1872, the City Council was granted power to establish a public library and reading rooms for the use and benefit of the inhabitants of the City, and to levy a tax on all taxable property in the City for library purposes. Section 2 authorizes the Mayor, with the approval of the City Council, to appoint a Board of Directors for the administration of the Library. Section 5 prescribes the powers and duties of the Board of Directors. (Ill. Rev. Stats. 1957, Ch. 81, Pars. 1, 2, and 5.) The Chicago Public Library was organized and established by the City of Chicago pursuant to these grants of power.

We have examined the Library Act and find no provision which authorizes the Library to sue, or be sued as a municipal corporation. In this respect it is unlike several municipal corporations doing business within the corporate limits of the City. The Acts creating the Chicago Park District, the Chicago Transit Authority, and the Board of Education of the City of Chicago, expressly provide that they may sue and be sued under their respective corporate names. (Ill. Rev. Stats. 1957, Ch. 105, Par. 333.3; Ch. 111-2/3, Par. 305; and Ch. 122, Par. 34-2.) This Department has held that the Library is not a separate municipal corporation, but is merely an agency of the city government organized to carry out a particular function of the City. (18 OP Corp. Coun. 68.)

The Chicago Public Library is not a body politic and corporate with legal capacity to sue, or be sued in its own name. Since it is not a municipal corporation, judgments may not properly be entered against it. In our opinion the Chicago Public Library is not liable as a separate legal entity for its torts.

2. "If liable, would the City or the Library be defendant?"

We have demonstrated that the Chicago Public Library was organized and is maintained as an agency of the City of Chicago. Under Section 2-9 of Art. 2 of the Cities and Villages Act it is provided that a City may sue and be sued in its corporate name. (Ill. Rev. Stats. 1957, Ch. 24, Par. 2-9.) The Supreme Court of Illinois in *Johnson v. City of Chicago*, 258 Ill. 494, held that the City of Chicago is the proper party defendant in a suit for negligence in connection with the operation of a motor vehicle by an employee of the Chicago Public Library.

It is well established that a municipality is liable for the negligence of its officers, or employees in the exercise of corporate, proprietary, or ministerial functions as distinguished from the exercise of governmental functions, and the doctrine of respondeat superior applies. (9 I.L.P. Section 472 and cases cited therein.) The Appellate Court of Illinois, in *Johnson v. City of Chicago*, 174 Ill. App. 414, aff'd. 258 Ill. 494, held that the City of Chicago maintains the Chicago Public Library as a ministerial activity and is liable for the torts of an employee of the Library. The Court stated at Page 417:

"While the question is not free from difficulty, the cases in this State tend to support the doctrine that where the City, in pursuance of the authority conferred by law, erects a public library, it is required to

exercise reasonable care in the maintenance and management of the library; that such duty is not discretionary, but ministerial, and that the City is liable for the negligent performance of such duty." *Chicago v. Seben, supra.*"

In our opinion the City is liable for the negligent operation and maintenance of the Chicago Public Library, and the City, and not the Chicago Public Library would be a proper party defendant in any action for recovery of damages by reason of such negligence.

3. "Would the Corporation Counsel defend?"

Under Section 6-2 of the Municipal Code of Chicago, the Corporation Counsel is charged with the duty to appear and protect the rights and interests of the City in all actions, suits and proceedings brought by, or against it.

In our opinion the Corporation Counsel, in conformity with this Section of the Code, would defend the City in any action or proceeding brought against it by reason of the negligent operation and maintenance of the Library.

4. "If judgment were entered for the plaintiff, from what fund would it be payable?"

Under Section 22-14 of Art. 22 of the Cities and Villages Act. Cities are empowered to levy a tax annually upon all taxable property within their corporate limits for the purpose, among other things, of paying tort judgments entered against them. (Ill. Rev. Stats. 1957, Ch. 24, Par. 22-14.) Pursuant to this statutory authority, the City Counsel annually levies and makes an appropriation designated "Judgment Tax Fund" for the payment of such judgments.

In our opinion any judgment entered against the City of Chicago because of the negligent operation and maintenance of the Chicago Public Library, would be paid out of the Judgment Tax Fund.

5. "If the Library did not carry insurance, what would be the liability of an employee involved?"

Under the common law of Illinois, a person is not absolved of personal liability to a third person on account of his negligence, or other wrongful act merely because at the time he was acting as an employee within the scope of his employment. An employer and employee are jointly and severally liable for injuries resulting to a third person from the negligence, or other wrongful act of the employee while acting within the scope and course of his employment, although the liability of the employer is based on the doctrine of respondeat superior. (17 I.L.P. Sections 256 and 257 and cases cited therein.) Whether or not the Chicago Public Library carries public liability insurance does not in any way affect the liability of a library employee for his negligence.

In our opinion an employee of the Library may properly be sued as the sole defendant, or he may be sued as a co-defendant with the City of Chicago, for his negligence arising out of his employment.

CITY TREASURER—ACCOUNTING PROCEDURES

(No. 12264—City Treasurer—J. C. M.—January 15, 1959.)

In your letter of January 7, 1959, you request an opinion as to the duties of the City Treasurer as outlined under the Statutes of the State of Illinois relating to accounting procedures.

Chapter 24, Section 9-58 sets forth the duties of the City Treasurer as follows:

"The municipal treasurer shall receive all money belonging to the municipality, and shall keep his books and accounts in the manner pre-

scribed by ordinance. These books and accounts shall always be subject to inspection of any member of the corporate authorities.

He shall keep a separate account of each fund or appropriation, and to the debits and credits belonging thereto.

He shall give every person paying money into the treasury a receipt therefor, specifying the date of payment, and upon what account paid. He shall file copies of these receipts with the clerk, with his monthly reports. If he has in his possession money properly appropriated to the payment of any warrant lawfully drawn upon him he shall pay the money specified in this warrant to the person designated by the warrant." Section 9-59 provides for monthly statements as follows:

"At the end of every month, and oftener if required by the corporate authorities, the municipal treasurer shall render an account under oath to the corporate authorities, or to such officer as may be designated by ordinance, showing the state of the treasury at the date of the account, and the balance of money in the treasury. He shall accompany the account with a statement of all money received into the treasury, and on what account, together with all warrants redeemed and paid by him. On the day he renders an account, these warrants, with all vouchers held by him, shall be delivered to the municipal clerk and filed, together with the account, in the clerk's office. He shall return all warrants paid to him marked "paid". He shall keep a register of all warrants, which shall describe each warrant, showing its date, amount and number, the fund from which paid, the name of the person to whom paid, and when paid."

Section 9-62 provides for the annual report of the City Treasurer.

Section 9-64 of Chapter 24 provides, in part, as follows:

"If a city comptroller is elected or appointed in a city, the city council, by ordinance or Resolution, may confer upon him the powers, and provide for his performance of the duties which the city council deems necessary and proper."

Section 9-67 sets forth the powers and duties of the City Comptroller as follows:

"The comptroller, if one is elected or appointed in a municipality, and if not, then the municipal clerk, shall exercise a general supervision over all the officers of the municipality charged in any manner with the receipt, collection, or disbursement of the municipal revenue, or with the collection and return of the municipal revenue into the treasury.

He shall have custody and control of all municipal documents, books and papers which the corporate authorities may designate."

Section 7-6 of the Municipal Code of Chicago relating to City Treasurer's reports and accounts provides as follows:

"The city treasurer shall receive all monies belonging to the city, and shall render at the end of each month, and oftener if required by the comptroller, a statement under oath to the comptroller, showing the state of the treasury at the date of such account and the balance of the money in the treasury. Such statement shall set forth all the monies received by him and from whom and on what account such money shall have been received. He shall also show all monies paid out by him, and on what account the same shall have been paid. The city treasurer shall cause books of accounts to be kept in such manner as to show with entire accuracy all monies received by him and from whom, and on what account they shall have been received; and all monies paid out by him and on what account they shall have been paid; and the same shall be shown in such manner that such books may be readily understood and investigated. Such books and all papers and files of his office shall at all times be open to examination of the comptroller, the committee on finance or any member of the city council."

Section 7-3 of the Municipal Code of Chicago defines the powers and duties of the Comptroller as follows :

"The comptroller shall be the fiscal agent of the city and as such, shall be charged with and shall exercise general supervision over all officers of the city charged in any manner with the receipt, collection, or disbursement of city revenues and all funds required to be in the custody of the city treasurer.

He shall have charge of all deeds, mortgages, leases, contracts, judgment orders, notes, bonds and evidences of indebtednesses belonging to the city, except such as are directed by law or ordinance to be deposited elsewhere. He shall have supervision of the issuance and sale of all bonds, warrants and obligations."

There are other duties relating to surety bonds that are not pertinent to the problem.

In your letter you state:—"The City Comptroller has a complete accounting of all appropriations, which duplicates our procedure, and Mr. Carl Chatters feels that we are carrying on an unnecessary operation."

The City Treasurer may adopt any form of accounting that will aid him in performing the duties prescribed by the Statutes and Code. From an examination of the duties of the City Comptroller and the City Treasurer, as set forth in the Statutes, it would appear that there would have to be some duplications in accounting between the two offices.

In my conference with Messrs. Curry and O'Neil of your office this day, I have been advised that all of the information that is contained in the separate appropriations accounts is fully covered in the General Ledger and register of accounts. It appears to me that the separate appropriations account could be abolished as it seems to serve no useful purpose. In connection with the appropriations made by the City Council, I am informed that the City Comptroller keeps detailed records and that he does not draw warrants unless there are proper appropriation balances. Since it is the duty of the City Comptroller to draw warrants for payment of City obligations, it is more proper that his records in regard to appropriations be more detailed and specific.

SALE OF INMATE PRODUCED ARTICLES

(No. 12281—*Superintendent, House of Correction—M. C. H.—May 4, 1959.*)

We have your letter to this office in which you request our opinion as to whether you may sell the woodwork articles produced in your Woodwork Shop, operating under the School Program at the House of Correction, to visitors and to persons working there, the funds collected to be used for replacement of tools and material.

Please be advised that Chapter 67, Paragraph 13 provides as follows :

"Expenses.) The expenses of maintaining any such house of correction over and above *all receipts for the labor of persons confined therein*, and such sums of money as may be received from time to time by virtue of an agreement with a county, as in this act contemplated, shall be audited and paid from time to time by the legislative authority of such city, and shall be raised, levied and collected as the ordinary expenses of the said city." (Emphasis supplied.)

While it is true that the State Legislature in an amendment to Chapter 108, dealing with penitentiary labor as expressed in Section 77, provides as follows:

"Labor of convicts not to be contracted for—Sale of products to state institutions or to Federal Government or agency.) The Department of Public Safety shall not, nor shall any other authority whatsoever, make any contract by which the labor or time of any prisoner or convict in any penitentiary or reformatory of this state or the product or profit of his work shall be contracted, let, farmed out, given or sold, to any person, firm, association or corporation except that the prisoners or convicts in said penal or reformatory institutions may work for, and the products of their labor may be disposed of by the state, or for or to any public institution owned or managed and controlled by the state, or to the Federal government or any agency thereof until August 1, 1953. As amended by act approved Aug. 2, 1951. L. 1951, p. 1962."

I am of the opinion that the provisions in said Section are not applicable to the House of Correction, but are strictly limited to the State institutions. Great care must be exercised on your part, that under no circumstances shall any of the products of such labor in your Woodwork Shop, under the School Program at the House of Correction, be sold in the open market in competition with legitimate industries and manufacturers.

It is our opinion that such work as described above may be classed as mental and occupational therapy. If the sale of the products of said labor is limited to visitors and persons employed in your institution, you may feel free to proceed with the program outlined in your letter to this office.

FIRE ALARM WITHIN 100 FEET OF SCHOOL

(No. 12307—Fire Commissioner—S. R. D.—December 15, 1959.)

We acknowledge receipt of your letter of December 10, 1959, calling our attention to the provisions of Section 64-3 (b) of the Municipal Code of Chicago which requires a fire alarm box to "be located within a distance of 100 feet from the principal entrance" of a school building.

You state a problem has arisen because some schools are set back from "the City property line by 500 feet." You request our opinion as to whether it is permissible to install a City Fire Alarm Box on private property. Although you do not state, we assume your problem arises in those instances where the principal entrance of a privately owned school is more than 100 feet from the City property line.

It is a cardinal principle of statutory construction to ascertain and give effect to the intention of the City Council. *Livingston v. Meyers* (1955), 6 Ill. 2d 325, 332. In ascertaining legislative intent one should consider the reason or necessity for the enactment and the meaning of the words, enlarged or restricted according to their real intent. Also, one should have regard to existing circumstances, contemporaneous conditions, and the objects sought to be obtained by the ordinance. *Petterson v. City of Naperville* (1956), 9 Ill. 2d 233, 245.

In the light of the foregoing principles of law, the intent of the City Council in enacting Section 64-3 (b) is readily ascertainable and should be given effect. The purpose of requiring the installation of a fire alarm box within a distance of 100 feet of the principal entrance of a school building is to make the alarm box readily available to the teachers and students in the school and residents in the area in case of a fire.

The purpose and intent of the City Council would not be given effect if the fire alarm box was installed at a distance greater than 100 feet from the school building. Therefore, we are of the opinion that in those instances where the principal entrance of a privately owned school is more than 100 feet from the City property line, an agreement should be entered into whereby the City would be given the right to install a fire alarm box on the school's property within a distance of 100 feet from the principal entrance of the school building. Such an arrangement would be of benefit to all concerned because of the added protection from fire to the building and the occupants thereof, as well as the protection from fire to the surrounding area and the citizens residing therein.

INSPECTION OF RECORDS

(No. 12323—Secretary, Board of Examiners—A. F. G.—March 1, 1960.)

Your letter of February 18, 1960, is as follows:

"The attached letter received by our office, with the request that we grant the use of our card file for the purpose of making a mailing list of about 12,000 names of Licensed Engineers.

The National Association of Power Engineers, Inc. will furnish all necessary material and help to set up this list.

We are asking your opinion, whether or not, we are permitted to grant this request, providing the list is used only as stated in their letter."

The list referred to is a public record which your board is required to keep by virtue of Section 20-16 of the Municipal Code of Chicago.

The common law prevails in the State of Illinois with respect to matters not regulated by statute. Under the common law no general right to inspect records exists where a party is without a direct interest in the subject-matter; and the statutes of this state do not specifically give the right of access to such records.

The common law rule is well stated in 34 Cyc. p. 592, as follows:

"At common law no person is entitled to inspect public records, either personally or by agent, or to make copies, abstracts, or memoranda therefrom, unless he has such an interest therein as would enable him to maintain or defend an action for which the record sought can be furnished as evidence or necessary information, and the interest of the person demanding the inspection must be direct and tangible."

The federal statutes and the statutes of many of the states have done away with the necessity of interest, and in such states any person may examine and take memoranda from public records.

In this state there is no such general provision, but there are many statutes expressly authorizing inspection of records that are particularly named. By reason of this, records and documents which are kept by virtue of provisions of the law are usually open to the public for inspection, and the impression seems to prevail quite generally that they can be examined as a matter of right; whereas, in fact, many of them are open to the general public more as a matter of favor on the part of the officer controlling them than as a matter of right. The right to inspect in any event is limited to such records and documents as the law requires the officer to keep.

Neither under the common law, the statutes or under the ordinance referred to above is any duty imposed on your board to permit the records of your office to be copied by persons desiring the information out of curiosity or for use in their personal business affairs. However, public officials in this city have always extended this courtesy to persons desiring information concerning the records in their offices subject to such reasonable regulations that they may determine are necessary to avoid interference with the orderly conduct of their offices.

In your case the information is desired for a commendable purpose and in our opinion you should comply with the request.

WEAPONS AND UNIFORMS FOR GUARDS

(No. 12331—Superintendent, House of Correction—M. C. H.—April 26, 1960.)

This office is in receipt of your letter, in which our opinion is sought concerning the legality of the newly organized "House of Correction Police Association."

Please be advised that the members of the newly organized "House of Correction Police Association" are not classed as policemen. They are classed as Guards and are only permitted to carry firearms while on duty as such within the confines of the House of Correction grounds.

Chapter 38, Par. 155 Sec. 4, entitled "Carrying Firearms" provides as follows:

"No person shall carry concealed on or about his person a pistol, revolver or other firearm. This provision does not apply, however, to the following officers *while engaged in the discharge of their official duties*: Sheriffs, coroners, constables, policemen or other duly constituted peace officers, and wardens, superintendents and keepers of prisons, penitentiaries, jails and other institutions for the detention of persons accused or convicted of crime * * *." (Emphasis supplied.)

From the provisions above, we take the position that these Guards are not permitted to carry any firearms when leaving the House of Correction after their day's work is over.

Concerning the uniforms the House of Correction Guards are wearing, it is our opinion that the uniforms should be made of a blue shirt and dark trousers with an insignia of a House of Correction Guard and if said uniform is bought and paid for by the Guards, then they should be permitted to wear said uniform to and from work. If, however, the uniforms are furnished by the institution, then we suggest that the Guards may be prohibited from wearing the uniform outside of the House of Correction grounds.

We are of the opinion that the Guards in the House of Correction have no police power outside of their duties as such Guards, more than any other civilian, who may be requested by a police officer for his assistance in the arrest of a person. It is further our opinion that the Guards should have an insignia on their hats as House of Correction Guards, so that when a Guard dressed in his uniform is off duty, he will not be mistaken for a police officer. It may also be said that the House of Correction Guards, carrying firearms while off duty, are subject to arrest for carrying concealed weapons, except when transporting prisoners to and from court rooms or to other penal institutions.

PUBLISHING CODE AMENDMENTS

(No. 12350—*Municipal Reference Library*—R. N.—July 21, 1960.)

Some time ago you submitted to this department suggestions concerning the reprinting of the Code and the subsequent handling of publication of the amendment inserts thereto by a designated publisher rather than under the present system. We have considered these suggestions from many angles as they raise questions upon which we have not heretofore passed and on which we find no rulings to which we may look for guidance.

Basically, the publication of a Code or compilation of the ordinances of a municipality is not a duty imposed by law. It is actually nothing more than a convenience made necessary by the growth of communities from small and uncomplicated groups of inhabitants to complex municipalities created and regulated by laws to meet the needs of developing civilizations. It is a task which logically has been performed by the law department since publication of the first compilation of Chicago's ordinances in 1881.

Chicago's present Code, published in loose-leaf form for the first time in 1939, made necessary the publication of amendment inserts thereto and, by section 1-4 of the Code, the corporation counsel is charged with the duty of periodically preparing and publishing revised loose-leaf pages, and the municipal reference librarian is charged with the duty of distribution. Nowhere is there any requirement for the publishing of an original compilation, or a revision of the general ordinances as a whole, or the reprinting thereof. Thus it is left entirely within the realm of administrative procedure and any method by which it is best accomplished, within the limits, of course, of the laws governing contracts would, in our opinion, be legal.

You point out in your letter that:

"The publication of reprints of the Municipal Code by officially 'designated publishers' has worked out very well, giving excellent service to the public and at the same time relieving the city of a publishing operation no department is really well organized to perform. It seems possible to me that the publishing of the complete Code and its periodic loose-leaf amendment inserts might be handled in a similar fashion."

We see no legal objection to the handling of the reprinting of the Code and the publication of amendment inserts thereto by an approved publisher in substantially the manner outlined in your letter, with adequate safeguards for the accuracy of the publication. As you point out, this has been successful with such projects as the Zoning Ordinance, the Building Code and the Electrical Code. However, an amendment to section 1-4 above referred to, in line with the proposed change in procedure would be necessary in such case.

We shall be glad to discuss the matter with you further at your convenience.

CHAPTER II—RIGHTS AND DUTIES OF CITY EMPLOYEES

A. CIVIL SERVICE

TERMINAL DATE OF KOREAN EMERGENCY

(No. 11791—Secretary; Civil Service Commission—C. H. L.—March 1, 1954.)

We acknowledge receipt of your letter dated December 18, 1953 in which you ask whether or not the national emergency proclaimed December 16, 1950 has been terminated.

In your letter you quote an amendment to Section 10½ of an Act to regulate the civil service of cities, presented in Senate Bill 566 and approved by the legislature on June 16, 1953, which reads as follows:

"Amends Section 10½ of an Act to regulate the civil service of cities. Included war veterans who served in the military or naval service of the United States at any time between June 25, 1950 and the date of the termination of the national emergency proclaimed December 16, 1950 for whom civil service preference is to be given."

Upon inquiry, we are in receipt of a communication from Douglas B. Anderson, Illinois Representative for Senator Douglas, dated December 22, 1953 in which he writes:

"With reference to your letter of December 21st, the national emergency proclaimed by the President December 16, 1950 is still in effect."

We have also been in touch by mail with the General Services Administration at Washington, D. C. and in reply received the following communication:

"GENERAL SERVICES ADMINISTRATION

National Archives and Records Service
Washington 25, D. C.

Mr. Carl Hjalmar Lundquist
Assistant Corporation Counsel
City of Chicago
Department of Law
511 City Hall
Chicago 2, Illinois

February 28, 1954

Re: Status of Proclamation No. 2914

Dear Mr. Lundquist:

Your letter of the 18th requested information concerning the status of Presidential Proclamation No. 2914, dated December 16, 1950.

Proclamation No. 2974, dated April 28, 1952, terminated the national emergencies proclaimed on September 8, 1939 and May 27, 1941. This proclamation did not affect Proclamation No. 2914, issued by the President on December 16, 1950.

Our records do not show any subsequent Presidential document affecting Proclamation No. 2914 of December 16, 1950.

Enclosed is a copy of the Federal Register issue of April 30, 1952, containing Proclamation No. 2974, which may be of interest to you.

Very truly yours,

(Signed) B. R. Kennedy
B. R. Kennedy
Director
Federal Register Division"

Enclosure

You will note that B. R. Kennedy, Director, Federal Register Division in his letter states:

"This proclamation (No. 2974) dated April 28, 1952 did not affect Proclamation No. 2914, issued by the President on December 16, 1950."

The copy of the Federal Register issued April 30, 1952, enclosed with Director Kennedy's communication substantiates his above statement.

In his proclamation No. 2974 dated April 30, 1952, the President of the United States said:

"Nothing in this proclamation shall be construed to affect Proclamation No. 2914, issued by the President on December 16, 1950, declaring that world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world, and proclaiming the existence of a national emergency requiring that the military, naval, air and civilian defenses of this country be strengthened as speedily as possible to the end that we may be able to repeal any and all threats against our national security, and to fulfill our responsibilities in the efforts being made through the United Nations and otherwise to bring about lasting peace; * * *"

In his communication, Director Kennedy further states:

"Our records do not show any subsequent Presidential document affecting Proclamation No. 2914 of December 16, 1950."

Answering your query, we are, therefore, of the opinion that you are to allow military preference to veterans from June 25, 1950 up to the present time and until the national emergency proclaimed on December 16, 1950, is proclaimed terminated by the President.

CHARGES AGAINST DUTY DISABILITY PENSIONER

(No. 11810—Commissioner of Police—C. H. L.—May 11, 1954.)

We have before us your communication dated April 22, 1954 in which you ask our opinion as to whether charges may be preferred against Patrolman John J. Naughton who is now on the Disability Roll of the Police Pension Board.

To your letter you attached a letter from the Inspector of Personnel dated April 20, 1954 in which he states:

"The Pension Board records show the Board granted Naughton an 'Ordinary Disability' as of May 16, 1952 and on Nov. 20, 1952 the Board granted him a 'Duty Disability' dating back to May 16, 1952 which is Naughton's present status on the Pension Board records."

We have checked the Police Pension Board's records and find that Mr. Naughton is still receiving said duty disability from the Police Pension Fund.

In his letter of April 20, 1954 the Inspector of Personnel further states :

"Dec. 4, 1953 the Pension Board advised the Commissioner that Naughton requested to be returned to duty and Pension Board Dr. Keeley found him fit for duty. Dec. 4, 1953 the Chief Surgeon was directed by the Commissioner to examine Naughton and submit a report on his findings. The Medical Sec. sent two letters to Naughton's address of record—7658 So. Park Ave.—directing him to report to the Medical Sec. Naughton failed to respond to either letter and same were not returned."

The Policemen's Annuity and Benefit Fund Act—cities over 200,000, Chapter 24, page 751 provides in Section 989 (page 771) :

"989. *Duty disability benefit—Disablement in Service.*) § 45 Benefit to be known as 'Duty Disability' shall be provided for policemen in the service who shall become disabled as the result of injury incurred in the performance of an act or acts of duty.

* * *

(b) Any policeman less than fifty-seven (57) years of age, who shall become disabled subsequent to the first day in the month of January of the first year after the year in which this Act shall come in force and effect in such city, as the result of injury incurred on or after said day in the performance of any act or acts of duty, shall have a right to receive duty disability benefit during any period of such disability for which such policeman shall not receive nor have a right to receive salary of an amount equal to seventy-five (75) per cent of his salary as it shall be at the time of such injury.

* * *

(d) Proof of disability shall be furnished to the retirement board, by at least one licensed physician, appointed by said retirement board, and said retirement board may require other evidence of disability. Each disabled policeman who shall receive any duty disability benefit under the provisions of this section shall be examined at least once a year by one or more licensed and practicing physician or physicians appointed by said retirement board. Such physician or physicians shall advise said retirement board, whether the disability of such policeman continues or not. When the disability of any such policeman shall cease, the said board shall discontinue payment of duty disability benefit and of child's disability benefit to such policeman and such policeman shall be returned to active service as a policeman."

And said Act further provides in Section 991 (page 773) :

"991. *When disability benefits not to be paid.*) § 47 Notwithstanding the provisions of sections 45 and 46 of this Act if any policeman who shall apply for or who shall have been granted any disability benefit under the provisions of said sections 45 or 46 shall refuse to submit to examination by any physician or surgeon appointed as aforesaid, such policeman shall not have any right to receive such disability benefit and any such benefit which shall have been granted shall be cancelled immediately upon such refusal."

The words

"* * * shall refuse to submit to examination by any physician or surgeon appointed as aforesaid * * *"

used in said Section 991 refers to physicians or surgeons appointed under Section 950 of the Act, the pertinent part of which reads :

"950. *Powers and duties of Board-Review of decisions.*) § 6 The retirement board shall have power and it shall be the duty of said retirement board to :

* * *

(m) appoint such actuarial, medical, clerical or other employees as shall be necessary."

See also Section 989 (d) above quoted.

Section 12 of the Cities Civil Service Act provides:

"Section 12. *Removals.* No officer or employee in the classified service of any city who shall have been appointed under said rules and after said examination shall be removed or discharged except for cause. * * *"

We are of the opinion that in view of the provisions of said Section 12 a patrolman cannot lose his civil service status or his right to this position because of disability until there is a finding to that effect by the Civil Service Commission after a hearing on charges at which he has an opportunity to be heard.

Should you have sufficient evidence that Mr. Naughton has violated the Sections of Rule 389 of your Rules and Regulations (and the provisions of the above quoted sections of the Policemen's Annuity and Benefit Fund Act) it is your duty to file charges against him before the Civil Service Commission.

REINSTATEMENT OF PROBATIONER AFTER MILITARY SERVICE

(No. 11834—Fire Commissioner—C. H. L.—July 7, 1954.)

We are in receipt of your letter of June 30, 1954, in which you request that we render an opinion relative to the status of Richard D. Cull who was a probationary Fireman when called into military service on October 3, 1953 and now seeks reinstatement to his position in the Fire Department.

The facts as you state them in your letter are these:

a.) "On October 1st, 1953, Richard D. Cull was assigned, after certification by the Civil Service Commission, to the position of Fireman Probationer in this Department."

b.) "Two days later on October 3rd, 1953, he advised this office that he was called to the military service of the United States and a report of military leave of absence, dated October 3rd, 1953, was forwarded to the Civil Service Commission."

c.) "Probationer Fireman Cull now presents himself at this office, advising that he is separated from the military service and seeks reinstatement to his position in this department."

You then ask our advice as to:

"Whether or not Mr. Cull is to be reinstated as a Fireman Probationer or as a Fireman 3rd Class, to which latter rank he would have automatically attained had he remained in the Department as of April 1st, 1954, or six months after the date of his original appointment."

The City Civil Service Act gives veterans preference only in certification for appointment. (Section 10½ of the Act) *Peo. Hanson v. Collins*, 351 Ill. 551, and the Civil Service Commission has no power to enlarge or diminish the preference of veterans. See our opinion No. 6986, Op. Corp. Coun. Vol. XVIII, p. 185.

In rendering our opinion in this matter we are, therefore, bound by the statute and rules of the Commission pertaining to probationers.

Section 10 of the Cities Civil Service Act provides in part as follows:

"* * * The appointing officer shall notify said commission of each position to be filled, separately, and shall fill such place by the appointment of the person certified to him by said commission therefor, *which appointment shall be on probation for a period to be fixed by said rules.*
* * *" (Emphasis ours.)

In accordance with sections 4 and 10 of the said Cities Civil Service Act the Civil Service Commission has adopted the following rule as to the period of probation. Rule IV, section 5 provides:

"Section 5. Probation. Original appointment shall be on probation for a period of six months. In no case shall a probationer be discharged until after the appointing officer has received from the Commission a notice in writing that the Commission has approved such discharge. Time served on probation, whether continuous or not, shall be credited upon the period of probation."

In our opinion No. 6360 (Op. Corp. Coun. Vol. XVII, p. 536 we held that the probation period need not be continuous.

From the facts set out in your letter we deduce that Cull served only two days on his probationary period of six months, viz.: from October 1, 1953 to October 3, 1953, and as the day of appointment is included in the six months probationary period (*Peo. Blachly v. Coffin*, 279 Ill. 401) he must serve another five months and twenty-eight days as a probationer before his appointment is complete.

As Cull has now presented himself for reinstatement to his position in your department, it is your duty to reinstate him as a probationary fireman to serve his full probationary period, providing there exists a vacancy in such position.

FIRE MARSHALS EXAMINATION

(No. 11857—President, Civil Service Commission—C. H. L.—September 28, 1954.)

We have before us for consideration your communication dated August 9, 1954 in which you say that your Commission has under consideration the holding of civil service examinations for either or both of the positions of Division Fire Marshal as Drill Master and Division Fire Marshal as Chief of Personnel Plans and Training and that those proposed examinations be open to Division Fire Marshals on a promotional basis.

You ask, if this should be done and either or both of the two first mentioned positions were filled by civil service appointment, whether in our opinion the Commission could hold a promotional examination for a higher position in Branch IV, Class T, Grade 7, and, in its discretion, make both Division Fire Marshals and the holder of either or both of the two first mentioned positions eligible to such Grade 7 position, i.e. treat civil service employees in all three Grade 6 positions as being in the next lower rank for the purposes of a promotional examination for the Grade 7 position.

The first part of your question refers to the three positions in Grade 7, viz.: Division Fire Marshal as Drill Master (1 position appropriated for in the 1954 budget salary \$8,136), Division Fire Marshal as Chief of Personnel Plans and Training (1 position appropriated for in the 1954 budget salary \$8,500) and Division Fire Marshals (18 positions appropriated for in the 1954 budget salary \$7,456).

The second part of your question, viz.:

"i.e. treat civil service employees in all three Grade 6 positions as being in the next lower rank for the purposes of a promotional examination for the Grade 7 position."

We are informed by Secretary Osborne that this second part of your question refers to the position of Chief of Battalion, Grade 6, Group A, Salary \$6,924 (75 positions appropriated for in the 1954 budget).

We shall first deal with the first part of your question:

You say that the Division Fire Marshal as Drill Master is classified in Br. IV, Class T, Grade 7: and that the Fire Marshal as Chief of Personnel, Plans and Training:

"May for the present purpose be regarded as being in the same Branch, Class and Grade in such Service"

You further advise that Division Fire Marshals are also in that same Branch IV, Class T, Grade 7.

In our opinion rendered to Hon. L. L. Sprague, Commissioner of Public Works on September 23, 1925, Op. Corp. Counsel, Vol. XIV, page 326, we held that Assistant Chief Clerks, who were in the same grade as Chief Clerks, had the right to take a promotional examination for the position of Chief Clerk. We quote from that opinion in which we now concur:

"The test of eligibility to try for promotion in the civil service is plainly prescribed by Section 9 of the Civil Service act as follows:

'All examinations for promotion shall be competitive among such members of the next lower rank as desire to submit themselves to such examination.'

The right here given to every member of the next lower rank, engaged in the same line of service, is given in language so plain and unequivocal as to admit of no possible construction by any Court or Commission that would in any degree limit or circumscribe that right."

That there may be different ranks in the same grade of the Civil Service and thus render eligible to promotion only those in the same grade (here Grade 7) who are in the next lower rank is recognized by the Civil Service Commission itself in Sections 5, 6, and 8 of Rule I, and Rule V, Section 2.

Sections 5 and 8 of Rule I read as follows:

"Section 5. Grade and Rank Contrasted. Grade is more inclusive than rank within the meaning of these rules. In situations where the ascertained status of positions herein classified into grades accords to one group or individual a definite or acknowledged standing over another, the recognition of rank shall take precedence over grade. The Commission shall define rank for examinations and appointments in its official notices of examinations and in the minutes of its proceedings and shall determine in each instance the distinction between ranks, the necessity for examination from rank to rank and eligibility thereto. Rank shall be held to include only those offices and places of equal authority and precedence."

"Section 8. Status of Positions. Whenever any office or place is created or raised in grade or rank or reestablished, the Commission shall determine the facts, and the branch, class, grade or rank to which it properly belongs, and no person shall be awarded any right or title to any position unless acquired by virtue of an examination held under these or preceding rules."

Rule V, Section 2 reads in part:

"Section 2. Eligibility. The Commission in its notices of examinations shall define lines of eligibility for promotion, specifying by title of position the particular rank or grade entitled to take such promotion examination. Promotion examinations shall be held when the next lower rank, whether in the same or a lower grade, as determined by the Commission, contains two or more eligible persons desirous of taking examination. * * *"

In construing a rule of the Commission substantially similar to Rule I Section 5 above quoted our Supreme Court in the case of *Peo. v. Errant*, 229 Ill. 56 said at page 64:

"Under this rule, classification for promotion must be from rank to rank, except as otherwise provided, in the same line of service. The requirement that the promotion is to be in the same line of employment rests on the rational basis that careful and studious attention to the duties of one station or place has an educational tendency to prepare one for advancement to a higher position in the same line."

In *McKown v. Hurley*, 343 Ill. App. 413, the Court said at page 417:

"The obligation to classify the offices and places of employment in the civil service necessarily carries with it not only the right but the duty to reclassify such offices and places of employment in furtherance of the purposes and successful functioning of the service. To hold otherwise would prevent correction of errors and betterment of service. If this is a reasonable basis for the reclassification the Courts cannot interfere."

In conclusion, and in answer to the first part of your question, it is our opinion that should the Commission decide that these positions in Grade 7 are in different ranks, and classify them accordingly, the Commission can then call a promotional examination for the higher rank, to which examination only Division Fire Marshals would be eligible as theirs is the only position containing the names of two or more persons.

As to the second part of your question in which you ask whether positions in Grade 6 can be classified in the next lower rank for the purposes of a promotional examination for the Grade 7 position, we submit the following:

The positions in Grade 6 to which you refer are, as we understand it, those of Chiefs of Battalion, Grade 6, Group A, Salary \$6,924.00 (75 positions appropriated for in the 1954 budget).

As to this position we refer you to your Rule V, Section 7, which provides:

"Section 7. Fire Promotions. No person shall be admitted to an examination for the position of Lieutenant in the Fire Department except Fire Engineers and Firemen. No person shall be admitted to an examination for the position of Captain in the Fire Department except Lieutenants in the Fire Department. No person shall be admitted to an examination for Chief of Battalion in the Fire Department except Captains in the Fire Department. *No person shall be admitted to an examination for the position of Division Fire Marshal in the Fire Department except Chiefs of Battalion in the Fire Department.*"

It is our opinion that under the rules of the Commission above quoted Chiefs of Battalion are now entitled to take a promotional examination for the position of Division Fire Marshal, an examination from Grade 6 to Grade 7 and on the basis of rank they cannot be held to be entitled to a promotional examination for any other position in Grade 7.

FILING TIME FOR MILITARY CREDITS

(No. 11930—Civil Service Commission—L. L. K.—July 25, 1955.)

In your letter of July 22, 1955, you inquire, in view of the passage of Senate Bill 708 by the last session of the legislature amending section 10½ of the Cities Civil Service Act, whether you can still require applicants to answer question 11 on your promotion examination identification sheet which relates to military service.

The amendment requires you to change your practice in relation to inquiring of the applicant concerning military credit and in granting military preference. The amendment provides as follows:

"No person entitled to preference or credit for military or naval service hereunder shall be required to furnish evidence or record of honorable discharge from the armed forces before the publication or posting of any eligible register or list resulting from said examination. Such preference shall be given after the posting or publication of any eligible list or register resulting from said examination. An eligible entitled thereto may claim such credit for such military preference at any time while said list is in force and effect."

From the foregoing it appears that you may no longer inquire of the applicant, concerning his military record, prior to the publication or posting of the eligible register resulting from the examination. Military preference must be accorded to every person on the promotion eligible register at any time he asks for it while that list is in force and effect.

We are returning herewith the certified copy of Senate Bill 708 as you requested.

SEASONAL EMPLOYEES

(No. 11939—Secretary, Civil Service Commission—S. R. D.—August 19, 1955.)

We are in receipt of your letter of July 28, 1955, enclosing a certified copy of House Bill 1101, which amends Section 11 of the Cities Civil Service Act (Ill. Rev. Stats. 1953, chap. 24½, par. 50) by adding to those individuals, who are exempt from classified service "seasonal employees", "which shall be defined as those persons whose employment does not exceed 90 days in any calendar year."

You ask if this amendment means "that people granted leave of absences or sick leaves or other reasons, that their positions can be filled by temporary employees, pending their return to the service, whether or not the Civil Service Commission has an existing list for certification to these vacancies." You also ask us to define what is meant by "seasonal employees."

Research fails to disclose any court decision in the State of Illinois which has defined the meaning of "seasonal employees." However, other jurisdictions have had occasion to discuss this problem. In *Froechly v. T. M. Harton Co.* (1927), 139 A. (Pa.) 727, the Court was called upon to determine whether dishwashing is a "seasonal occupation" as defined under the Workmen's Compensation Act. The Court, after a thorough discussion of the

problem, held that dishwashing was not a seasonal occupation, saying (p. 730):

"Seasonal occupations logically are those vocations which cannot, from their very nature, be continuous or carried on throughout the year, but only during fixed portions of it. On the other hand, labor or occupation possible of performance and being carried on at any time of the year, or through the entire twelve months, is certainly not seasonal. The work of dishwashing comes under this latter classification. It is performed as a matter of universal custom and necessity each day of the entire year, in homes, in restaurants, or wherever else table service is used, and is a work or occupation to perform which persons seek paid employment almost anywhere and at any time, or at all times, of the year. It may be, as in the present case, carried on at a summer resort for merely three months in the year—three months of the summer time—but at innumerable other places dishes are being washed, for wages, every day in the same year, and the clatter of the dishwasher will continue every day throughout years to come. Appellant here confuses the character of work—dishwashing—performed by claimant, with the seasonal period during which the amusement park remained open to the public. It is not to be denied that the persons, who own or control or operate the particular park at which claimant was employed, are, during the period their park is open for business and being operated by them, engaged in a seasonal occupation, one which regularly begins about the 1st of June and ends approximately September 1st. That period embraces their usual summer amusement season, and incidental to a profitable operation of the business of the park is such labor as washing dishes, cooking for the restaurant, and scrubbing floors, all of them are occupations, necessary for the successful management of the resort for usually three months, but also necessary and carried on for pay regularly for the full year in innumerable other places."

In *Hiestand v. Ristu* (1939), 284 N. W. (Neb.) 756, the Court held that a carpenter was not a "seasonal employee," saying (p. 760):

"It is further insisted that the employment was seasonal and that consequently compensation was erroneously allowed under the workmen's compensation law. Comp. St. 1929, sec. 48-126. The law is that 'seasonal employment' refers to occupations which can be carried on only at certain seasons or fairly definite portions of the year, and does not include such occupations as may be carried on through the entire year.' Hogsett v. Cinek Coal & Feed Co., 127 Neb. 393, 255 N. W. 546, 93 A. L. R. 305. See Gorham v. Kiewit Sons Co., 129 Neb. 277, 261 N. W. 353; Lincoln Gas & Electric Light Co. v. Watkins, 113 Neb. 619, 204 N. W. 391. The true import of the evidence is that the trade or occupation of a carpenter may be pursued throughout the year. It follows that it is not seasonal as a defense to workmen's compensation."

In *Pryor v. Brickley* (1939), 5 A. 2d (Del.) 242, the Court, in discussing what is "seasonal employment" under the Workmen's Compensation Act, said (p. 244):

"The Industrial Accident Board held the phrase, 'dependent upon the weather,' to be merely a descriptive reference to the word 'seasonal'; as the employer admitted that carpentry was not a seasonal employment, and as obviously it was not 'casual,' it necessarily fell into the category of employments denominated as 'continuous'; and the injury, therefore, was compensable under the third sentence of the section which is concerned with continuous employments.

"This was error. The second sentence of the section makes compensable provisions for two distinct types of employment. The descriptive word 'seasonal' is a common place word. Its meaning as pertaining to the season of the year is well understood. A seasonal employ-

ment is no more or less than one which pertains to a specific season of the year, and, as used in the statute, it means that kind of labor which can be performed only during certain periods of the year. A seasonal employment is not one dependent upon the weather except in a large and general sense. It is one dependent upon conditions caused mainly by the relative position of the earth's axis with respect to the sun. Likewise, except in a large and general sense, an employment dependent upon the weather is not a seasonal employment. It is an employment dependent upon weather conditions generally, the fluctuations of which may occur in any season of the year."

In *Local Union, etc. v. Howard Bus Lines* (1947), 43 S. E. 2d (Ga.) 523, the statute provided that no labor organization should call a strike until after a thirty days' written notice but excepted therefrom those labor unions "in seasonal industry such as the ladies' garment, hat and millinery and men's clothing industry, * * *." The Court held the legislation to be a nullity, because the proviso excepted each and every class of industry from its operation, saying (pp. 523-524):

"This conclusion is necessitated for the reason that the exemption section defines the exempted 'seasonal industries' as being those 'such as' 'ladies' garment, hat and millinery and men's clothing,' and since all industries *such as* these are excluded as 'seasonal' it follows that all other industries must of necessity be likewise so adjudged. Seasonal industries can only properly be taken to include such as are made so by natural causes (Annual Rept., 1941 Sect. of Labor, Wage & Hour Div., p. 162), and mere peaks and lulls in consumer demand with respect to a given industry cannot properly be said to so distinguish it. Here not only is there an absence of any natural cause such as would include the industries named to be taken as seasonal; but in point of fact men and women buy and wear clothing throughout the spring, summer, autumn, and winter, and the industry producing such articles is presumably constantly employed and cannot possibly be termed as seasonal in any sense of the word. Since all other industries *such as these* by the terms of the statute are likewise sought to be exempted; there is nothing left for Section 54-703 to operate on, and it therefore becomes wholly ineffective."

In *Mohler v. Department of Labor* (1951), 409 Ill. 79, the Court was called upon to determine whether the plaintiffs were ineligible for benefits under the Unemployment Compensation Act where the record disclosed that they were women sixty-five years of age, who, for 28 years, had been employed by the Milford Canning Co., Milford, Illinois, during the asparagus pack which lasts from six to eight weeks in the spring of each year, and during the corn pack which lasts from four to six weeks in late summer of each year. The Court, in holding that the plaintiffs were not eligible for benefits under the Act, discussed their "seasonal work," saying (pp. 85-86):

"Both women resided for twenty-seven years in communities that presented no labor market outside seasonal work, and offered no transportation facilities to other available labor markets. It is apparent that neither claimant sought additional work outside or within their communities until this litigation was commenced, and even then the evidence is meager that either fully or adequately canvassed the labor markets to which they did have access. *The habit, borne over a long period of years of working only seasonally is indicative of a mental attitude of contentment to remain out of the labor market during the off season of the canning industry.* Under such circumstances, it cannot be said that either appellee was currently attached to the labor market, and available for work within the requirement of our Unemployment Compensation Act."

From the foregoing, it is apparent that a "seasonal employee" is one who, because of the season of the year, rather than the weather, can be employed only in a certain portion of each year. However, the Act defines "seasonal

employees" to be "those persons whose employment does not exceed 90 days in any calendar year." Such a definition is contrary to judicial interpretation and, if strictly followed, could be used as a means to nullify the Civil Services Act and Civil Service. By this definition, the department heads could employ individuals for a period not exceeding 90 days as "seasonal employees" and such employees would be exempt from the classified service.

However, the Court has held that the legislature cannot legislate contrary to the fact. In *Stolze Lumber Co. v. Stratton* (1944), 386 Ill. 334, the legislature had amended the Retailers' Occupation Tax Act by providing that "use or consumption," in addition to its usual and proper meaning, shall be considered to include the employment of tangible personal property by persons engaged in service occupations (including construction contracting and other service occupations of like character.) * * * The Court held that such a definition was contrary to their previous definition of "use or consumption" and, therefore, unconstitutional, saying (p. 340) :

"The transfer of property from the contractor to the owner contemplated in the amendment, is clearly a transfer in some form for a valuable consideration. (*Bradley Supply Co. v. Ames*, 359 Ill. 162; *Material Service Corp. v. McKibbin*, 380 Ill. 226.) It is clearly apparent therefore that this amendment introduces an inconsistency in the Retailers' Occupation Tax Act and evidences an intent to call that a retail sale which not only the statute itself declares shall not be such, but which cannot, in view of the purpose of the act and the settled meaning of the term, be so defined. *It is recognized that the General Assembly may make reasonable definitions of terms found in an act, and that such definitions will, for the purpose of the act, be sustained. But it is also well settled that it may not declare that to be a fact which is not a fact.* (*Carolene Products Co. v. McLaughlin*, 365 Ill. 62; *Winter v. Barrett*, 352 Ill. 441.) Both the title and the provisions of the act relate to a tax upon persons engaged in the business of selling tangible personal property 'to purchasers for use or consumption.' 'To purchasers for use or consumption,' must, both by commonly understood meaning and by the construction which this court has given to the language of the act and its title, be construed to mean, for use or consumption by such purchasers. Such language must also mean a sale where the article sold is not to be, in any form, transferred or resold for a valuable consideration, since such a sale would not be for the use or consumption of such purchaser, as the title and the act provide."

On the other hand, the courts have held that, if possible, a statute should be construed in a manner which will uphold its validity. *Ambassador East, Inc. v. City of Chicago* (1948), 399 Ill. 359, 364-365; *The People v. Dale* (1950), 406 Ill. 238, 247; *City of Chicago v. Willett Co.* (1950), 406 Ill. 286, 289. If we were to construe "seasonal employees," as used in the Amendment, to be those individuals, who, because of the season of the year, rather than the weather or nature of work, can be employed only in a certain portion of each year and "whose employment does not exceed 90 days in any calendar year," as being exempt from the classified service, then the Amendment would be reasonable and in conformity with the spirit and purpose of the Cities Civil Service Act.

You also ask whether the Amendment would permit the filling, by temporary employees, of those positions vacated by people granted leaves of absence or sick leaves, "pending their return to the service, whether or not the Civil Service Commission has an existing list for certification to those vacancies." The Amendment relates only to those individuals who are exempt from the classified service and has no effect on the manner in which the Commission shall fill positions left vacant by persons on leaves of absence or sick leaves.

Summarizing the foregoing, we are of the opinion :

1. That the Amendment to Section 11 of the Cities Civil Service Act, providing for "seasonal employees" should be interpreted to mean

those employees who, because of the season of the year, rather than the weather or nature of work, can be employed only in a certain portion of each year and whose employment does not exceed 90 days in any calendar year, and

2. That the Amendment relates only to those individuals who are exempt from the classified service and has no effect on the manner in which the Commission shall fill positions left vacant by persons on leaves of absence or sick leaves.

VACATION & SICK LEAVE STATUS FOR CROSSING GUARDS

(No. 11985—Alderman, 26th Ward—L. L. K.—Nov. 30, 1955.)

On November 28, 1955, we wrote you that the position of Crossing Guard is in the classified civil service, Branch IV, Class S, Grade 2, and as such is entitled to the usual employee benefits pertaining to such employment. You have informed us orally that it has always been considered that this position is not entitled to the customary sick benefits, vacations, etc., because the compensation is on an hourly basis and the work is only part-time. We have re-examined the question in view of your statement.

The position of Crossing Guard was created by the Annual Appropriation Ordinance for 1951. In the appropriation for the Department of Police, Uniformed Force has "Crossing Guards as needed at \$1.50 per hour" without any specific number or gross amount provided for. The position was thereafter classified by the Civil Service Commission as part of Branch IV dealing with Public Safety and is set forth in the 59th Annual Report of the Civil Service Commission (1953), at page 96 as follows:

"CLASS S—POLICE SERVICE

Embracing positions in the active ranks of the Police Department and positions directly related to the performance of Police Duty."

The Annual Vacation and Sick Leave Order for 1955 (C. J. P., page 8767) sets forth the vacation and sick leave allowances for employees of the City of Chicago for the year 1955 and concludes with a statement that "all active members of the Department of Police" are exempted from the effect and operation of the order. It is clear, therefore, that the position of Crossing Guard is not affected by the aforesaid provision relating to vacation and sick leave for City employees.

We find nothing in Chapter 25 of the Municipal Code dealing with officers and employees which has any bearing on this question. Chapter 11, which deals with the Department of Police provides in Section 11-2 that:

"To supplement the police force the commissioner of police may appoint such number of civilian crossing guards to regulate traffic in the vicinity of grade schools during such hours of school days as may be required for that purpose."

This provision follows immediately Paragraph 1 of Section 11-2 which itemizes the various classes of positions which are designated as "policemen" and which is stated "shall constitute the police force of the city". Except for the provision in Section 11-43 which states that "Each member of the department of police shall be entitled to a leave of absence from duty for 20 consecutive days each year, with full pay." There is no other provision in Chapter 11 bearing on the question of vacation or sick leave other than that the Commissioner of Police is authorized and directed to make rules for the regulation of his department. The Rules and Regulations of the Department of Police provide for vacation and sick leave.

There is quite obviously an inconsistency which arises from the classification by the Civil Service Commission of the position of Crossing Guard as a position "in the active ranks of the Police Department" and the provision in Chapter 11 that Crossing Guards shall supplement the police force, but these Crossing Guards are not included in the designation of policemen who constitute the police force of the City. If they are active members of the police force they are entitled to vacation and sick leave to the same extent as are other members of the police force; if they are not active members of the police force in the sense that they are not policemen, then they are at the very least civilian members of the police force and would be entitled to vacation and sick leave as would other civil service employees of the City. In either event, it is clear that the present ordinance provisions are not geared to the allowance of vacation and sick leave to persons not employed on an annual basis and it necessarily follows that clarification of the method by which vacation and sick leave benefits may be made available in these circumstances is necessary and an appropriate ordinance to that end should be formulated.

COMPUTING EFFICIENCY MARKS

(No. 12144—Secretary, Civil Service Commission—S. R. D.—July 19, 1957.)

We acknowledge receipt of your communication of July 15, 1957, in which you request our opinion as to the method to be used to compute efficiency marks to be given applicants in promotional examinations for Assistant Chief Clerk and Assistant Chief Accountant. You state that "a number of the candidates who participated are on leave of absence from their Civil Service position for a grade lower than that for which they took the promotional examination".

Attached to your communication are copies of orders issued relative to said examinations setting forth the method in which efficiency should be determined and credited. The orders provide, among other things, that the efficiency grade shall be ascertained "from the nearest completed six months period for which an efficiency mark was given, prior to the actual date of examination" and that if the candidate has been in his position for less than six months, "the commission may rely upon a period of time less than six months and average and compute the efficiency grade to be used for that candidate".

In conference, you suggested that our discussion be limited to an interpretation of the opinion in the case of *People ex rel. Dragel v. O'Connor*, 10 Ill. App. 2d, 156, in so far as it relates to the method of computing credit for efficiency.

Dragel took a promotional examination for sergeant of police and was certified and appointed a sergeant on May 1, 1953. On May 2, 1953, he took a leave of absence as sergeant and served continuously as police chemist at a salary of approximately \$1,000. a year in excess of that paid to sergeants. In the latter part of 1954, he took a promotional examination for police lieutenant and was placed No. 55 on the promotional eligible register for lieutenant of police. He requested that his efficiency grade of 88.83 and his seniority grade of 70 be increased. The trial court ordered that his seniority grade be increased to 73 and his efficiency grade to 90. These increases, with credit for military service, would advance him 14 places on the eligible register. The Appellate Court reversed the judgment of the trial court saying (p. 201):

"Credit in a promotional examination for actual service and efficiency in the rank and grade from which promotion is sought is

given because such service tends to qualify the employee for the higher position, and efficiency in the lower grade is an index of fitness for the promotion sought. Efficiency in the job of police chemist is no more an indicator of fitness for the job of police lieutenant, which involves, with other duties, the commanding of men and the meeting of emergencies in preventing crime and apprehending criminals, than is fitness in the job of licensed pharmacist or chemist in private employment. Promotional examinations are restricted to employees in the classified service. It necessarily follows that efficiency which qualifies for promotion must be as an employee in a rank or grade of the classified service lower than the position to which promotion is sought. Plaintiff served only one day as a police sergeant. He has no record of service on which efficiency credit as a sergeant can be based. He is entitled to only the minimum credit for seniority and efficiency in the position of police sergeant."

The effect of the *Dragel* opinion is that one is entitled to only the minimum credit for efficiency if he was not an actual employee in the rank or grade of the classified service lower than the position to which promotion is sought.

Applying the foregoing rule of law to the determination of efficiency marks to be given applicants in promotional examination for Assistant Chief Clerk and Assistant Chief Accountant, it is apparent that those candidates who participated in the examinations and who were not actually employed in the rank or grade of the classified service lower than the position to which promotion is sought for any of the six month period immediately preceding the giving of the promotional examination are entitled to only the minimum credit for efficiency in the position from which promotion is sought.

COMPUTING EFFICIENCY MARKS

(No. 12153—Secretary, Civil Service Commission—J. C. M.—August 12, 1957.)

Supplementing our letter of July 19, 1957 relative to the method to be used for efficiency marks to be given applicants in promotional examinations for Assistant Chief Clerk held August 18, 1956 and Assistant Chief Accountant, held December 8, 1956, we make the following observations.

It appears from our letter "In conference, you suggested that our discussion be limited to an interpretation of the opinion rendered in the case of *People ex rel. Dragel v. O'Connor*, 10 Ill. App. 2d 156, insofar as it relates to the method of computing credit for efficiency." In that case, the method of computing credit for efficiency, and the orders entered by the Commission prior to the examination were not involved. The principal question involved in that case was whether the posting of a promotional list on register could be changed in order to give an examinant a higher efficiency mark than was accorded to him by his department head.

Under Section 3 of Rule V credit for seniority shall be given only for actual service in the rank or grade from which promotion is sought, whether such service has been continuous or not.

In *Mulcrone v. O'Connor*, 13 Ill. App. 2d 549, the court said:

"The Commission has statutory authority to provide by its rules for promotion on the basis of ascertained merit, seniority in service and examination. Ill. Rev. Stats., 1955, Chap. 24½, par. 47, Sec. 9."

By Section 3 Rule V the Commission has set forth the basis for credit for seniority.

"Efficiency" is to be determined under Section 4 of Rule V and the ratings given by the Commission are final upon posting of a promotional list. Under this Section 4 "Records of efficiency of appointees in the classified service shall be ascertained by the Commission in such manner as it may determine as evidenced by its action and may include reports derived from heads of departments or bureaus or from investigations made by the Commission". Under this section "independent investigations may be made for such examinations as in the opinion of the Commission circumstances warrant."

It appears from orders entered by the Commission prior to the examinations referred to that the Commission has determined the method of ascertainment of efficiency credits under Section 3 of Rule V.

We are of the opinion that you should follow the provisions of the orders. The courts cannot take away authority granted to the Commission and Section 4 of Rule V, adopted by the Commission, is binding upon the Commission. The orders entered as to particular examinations are merely explanatory of the procedure to be followed. They are all within the framework of the rules.

PROMOTIONAL CERTIFICATION OF SUSPENDED EMPLOYEE

(No. 12154—Commissioner of Buildings—J. C. M.—August 13, 1957.)

On August 9, 1957 you advised that Mr. William F. Thornton, civil service building inspector, is No. 1 on the promotional list of Assistant Chiefs of Inspection and that Mr. Thornton is presently suspended and awaiting trial before the Civil Service Commission for conduct unbecoming an employee. You inquire as to whether or not you can refuse to accept Mr. Thornton to the position of Assistant Chief of Inspection.

Promotions in civil service and all rights thereunder contemplate efficient performance of the duties in the grade in which the employee has been certified prior to the taking of a promotional examination. We assume that the information that brought about the suspension of Mr. Thornton and the filing of charges before the Commission occurred subsequent to the taking of the examination and the classification on the certified list, which information was not available to the Civil Service Commission at the time of giving the efficiency marks in connection with the promotional examination.

Since the charges are directed to the employee in the grade in which he was certified and performed services which are now questionable, no certification can be made from the Assistant Chief of Inspection list of this employee until the charges pending before the Civil Service Commission have been disposed of. You are justified in refusing to accept the employee on that basis.

Furthermore, under Section 1 of Rule IV of the Civil Service Commission, there is the following provision:

"Where vacancies are to be filled from a promotion register, the Commission shall certify same to the appointing officer the names of three standing highest on such register * * * who shall appoint one of those so certified."

So under this provision if there is one position to be filled, you could refuse to accept Mr. Thornton as an appointee even though his name was included in the three names submitted by the Civil Service Commission.

OUTSIDE EMPLOYMENT

(No. 12156—Secretary, Civil Service Commission—J. C. M.—August 22, 1957.)

In your letter of August 16, 1957 you referred to an inquiry made at your office by the Civil Service Protective Association as to the restrictions, if any, upon civil service employees engaging in outside employment after they have rendered the required daily service of their various departments.

We find no provision in the Civil Service Act nor in the Rules of the Civil Service Commission bearing upon the subject. It appears that the Police Department and the Building Department have rules prohibiting employees from engaging in any other occupation or vocation. The regulations of the Fire Department would indicate that firemen are subject to call by the Chief Fire Marshal regardless of the hours of duty specifically assigned to them and therefore they would be in the same category as the employees of the Police Department.

Every civil service employee, of course, would be subject to discipline if he did not perform the duties assigned to him during the hours required. However, until the City Council, the Civil Service Commission or other Department Heads should promulgate rules and regulations relative to outside employment, it appears to us that where there is no conflict of interest between civil service employment and other employment elsewhere during hours other than those required to fulfill the civil service status, the employee would not be subject to discipline by the Department Head or the Civil Service Commission.

STATUS IN PRIOR POSITION AFTER DISCHARGE

(No. 12162—Commissioner of Buildings—C. H. L.—September 24, 1957.)

We herewith acknowledge receipt of your communication dated September 12, 1957 in which you inquire as to whether a man who is a Civil Service Building Inspector and accepts appointment as a Civil Service Assistant Chief of Inspections and should, during his six (6) months probation as an Assistant Chief of Inspections be dismissed from that position, would have any rights under his former Civil Service status as a Building Inspector.

Rule IV, Section 3 of the Civil Service Commission's Rules provides:

"Section 3. Certification from More than One Register. An employee who leaves a position to accept employment by certification from another eligible register shall be separated permanently from the position formerly held by him. Any such employee, may within

six months, be reinstated in any vacancy in the same branch, class and grade from which he was so separated, with the consent of the Commission and the approval of the department or departments concerned, or his name may be placed on the appropriate reinstatement register upon his resigning from, or being separated from, his new position. Where an officer or employee accepts certification to a higher position, the duties of which are merely temporary, he shall be reinstated in his former position without loss of seniority when such higher duty is completed, if and when such former position is or shall become vacant."

We are, therefore, of the opinion that a Building Inspector who leaves his position to accept employment as an Assistant Chief of Inspections is separated permanently from his previous position as a Building Inspector.

He may, however, within six months, be reinstated in any vacancy in the position of Building Inspector with the consent of the Civil Service Commission and the approval of the Building Commissioner.

If he has resigned from the position of Assistant Chief of Inspections the Civil Service Commission may, under its Rule IX, Section 2 permit the withdrawal of his resignation within 30 days after the filing of an application of cancellation of the resignation, provided the Building Commissioner approves of said withdrawal and cancellation.

If he is separated or discharged from his position as Assistant Chief of Inspections, his name may be placed on a reinstatement list for the position of Building Inspector by the Civil Service Commission with the consent of the Building Commissioner.

DISCOVERY AT TRIAL BOARD HEARINGS

(No. 12165—Secretary, Civil Service Commission—J. C. M.—October 1, 1957.)

In your letter of September 12, 1957, you request an opinion; as to whether the Commission must disclose upon written requests of attorneys for civil service employees charged with violations to examine the files of the Police Department and the Commission before the hearing.

The attorneys apparently rely upon the decision rendered in the case of *Jencks v. United States*, 353 U. S. 657.

It is our opinion that the *Jencks* case does not open the door to an examination of the records referred to. If, during a trial, it should appear that some witness has filed a report either with the Police Department, Civil Service Commission or any other department of the City relating to the subject matter being tried by the Commission, and that such report might be material for the purpose of impeaching the witness, then the Commission should rule whether the document should be submitted to counsel for the person charged. Until there is a court ruling on this specific matter, we are of the opinion that the *Jencks* case has no application.

CHANGE OF TITLE

(No. 12196—*Fire Commissioner—C. H. L.—January 24, 1958.*)

Answering your communication dated January 8, 1958 with reference to Battalion Fire Chief and Firefighter in the 1958 budget, please be advised as follows:

Rule I. Sections 7 and 8 of the Civil Service Commission's Rules provide:

"Section 7. Titles. Titles shall be indicative of the branch, class and grade or rank of each position in the classified service and changes shall be reported to the Commission.

Section 8. Status of Positions. Whenever any office or place is created or raised in grade or rank or re-established, the Commission shall determine the facts, and the branch, class, grade or rank to which it properly belongs, and no person shall be awarded any right or title to any position unless acquired by virtue of an examination held under these or preceding rules."

Under these sections the Commission determined that the titles used in the budget applied to the positions of Chief of Battalion and Fireman and in their minutes of January 22, 1958 ordered as follows:

"Miscellaneous.

Ordered, that the title of 'Fireman' be changed to 'Firefighter', and it is further

Ordered, that the title of 'Chief of Battalion' be changed to 'Battalion Fire Chief.'

These changes are made to be in accordance with the 1958 budget."

The titles of these positions are therefore now reclassified by the Civil Service Commission, and if you desire to fill any such position in the future your requisition should call for Battalion Fire Chief and Firefighter.

CREDIT FOR MILITARY SERVICE

(No. 12204—*Secretary, Civil Service Commission—C. H. L.—February 17, 1958.*)

We refer to your letter dated December 18, 1957, to which you attach a letter dated December 17, 1957 sent you by Attorneys Lane, Duffy & Connell, in which they state as follows:

"Dear Mr. Osborne:

We represent Mr. Thomas J. Sheehan, a Fireman of the City of Chicago assigned to Engine No. 101.

Mr. Sheehan was appointed as a Fireman in the classified service of the City of Chicago on January 16, 1954. On August 16, 1954, Mr.

Sheehan took a military leave of absence, entered the United States Army, fulfilling his required two years of service therein, was honorably discharged and reinstated as a Fireman on September 1, 1956.

At the time of his entry into service, Mr. Sheehan had completed his probationary period and was a Fireman third class for pay purposes. Had his service as a Fireman not been interrupted by military service, Mr. Sheehan would have reached the second class for pay purposes on July 16, 1956.

When Mr. Sheehan was reinstated to the Fire Department, he was placed in the same class for pay purposes (3rd class) as he occupied prior to his entry into the armed forces.

We believe that Mr. Sheehan was entitled to reinstatement in the Fire Department on September 1, 1956, as a Fireman in the first class for pay purposes. We also maintain that Mr. Sheehan is entitled to the difference in pay from the City of Chicago of the pay of a first class Fireman and whatever amounts he has received in the lower pay classifications from the date of his reinstatement."

If the facts as set out in the above quotation correspond with your records, we are of the opinion that you are to be guided by the procedure set out in our communication to Hon. Dolores Sheehan, President of the Civil Service Commission, dated July 18, 1957 as to the status of servicemen on military leave, in which opinion we cited Section 151 of Chapter 24½ Ill. Rev. Stats. 1955 (page 957) and concluded as follows:

"We are of the opinion that, under the provisions of the aforesaid Act, it is your duty to give a person who was on furlough or military leave the same credit for seniority as he would have been entitled to had he stayed in the service of the City during such furlough or military leave; and from the date of his return from such furlough or military leave and his reinstatement to his position in such status to allow him the salary or wage rate step he is accordingly entitled to, under the appropriation ordinance of the City Council of the City of Chicago, for the year of his reinstatement."

We concur in our aforesaid opinion of the law and say that Mr. Thomas J. Sheehan is entitled to such consideration as a veteran on military leave.

We return herewith Lane, Duffy & Connell's letter of December 17, 1957.

POSITIONS PAID FROM FEDERAL FUNDS

(No. 12266—Civil Service Commission—C. H. L.—January 20, 1959.)

We acknowledge receipt of your communication dated December 19, 1958 in which you request our opinion as to the following query:

"Do we have the authority to classify positions:

- a. Paid out of Federal Funds (as in the Board of Health);
- b. Paid out of the various bond funds:
 - (1) Community Conservation Area Bonds;
 - (2) Slum Clearance Bonds."

Upon further inquiry into the matter we have your memo dated January 7, 1959 in which you say:

"This is a further clarification of the memo forwarded to you by this Commission on December 19, 1958, requesting an opinion as to the role of the Civil Service Commission in the classification of certain positions in the City Service.

Do we have authority to classify positions:

(a) paid out of Federal Funds in the Board of Health. Employees paid out of Federal Funds in the Board of Health appear on our payrolls, but the specific jobs are not listed in the budget.

(b) paid out of the various bond funds. *Community Conservation Area Bonds*: This is a group of employees of the Community Conservation Board who appear on our payrolls, but whose jobs are not specifically listed in the budget.

Some employees of the Department of City Planning also are paid out of Community Conservation Area Bonds, Budget Codes 1320-801 and 1320-803. There is also a group working under the Consultant to the Department of City Planning paid out of Community Conservation Area Bonds, budget code 1320-802. Further there is a group of employees in the Department of City Planning paid out of the *Slum Clearance Bond Fund*. To reiterate, these employees appear on our payrolls, but their jobs are not specifically listed in the budget.

Examples of Types of Positions on Federal Funds from Board of Education

Key Punch Operators
Senior Tabulating Machine Operators
Head Tabulating Machine Operators
Director (Public Health Methods)
Statistician
Supervisor I
Head Clerk
(All Temporary employees)

Mr. Chatters had no new information on employees paid out of *Bond Funds*, except that he did say that he thought most of them were on voucher.

However, we do have some that appear on payroll, but whose jobs are not specifically listed in the budget."

The principal functions of the Civil Service Commission of the City of Chicago, as prescribed by statute, relate to the classification of offices and places of employment with reference to examinations, the conduct of examinations for offices and places of employment in the classified service, the certification of payrolls, the maintenance of eligible registers and various other personnel records and the conduct of investigations.

The Cities Civil Service Act makes no provision for the fixing of salaries by the Civil Service Commission and said Commission cannot veto appropriations for salaries made by the City Council.

Only the City Council has power to create or establish positions and places of employment in the city service.

Only the Civil Service Commission has power to classify these positions and places of employment according to the manner and purpose for which the Council establishes them.

Section 3 of the Cities Civil Service Act provides:

"Section 3. Classification. Said commissioners shall classify all the offices and places of employment in such city with reference to the examinations hereinafter provided for, except those offices and places mentioned in Section 11 of this act. The offices and places so classified by the commission shall constitute the classified civil service of such city; and no appointments to any of such offices or places shall be made except under and according to the rules hereinafter mentioned."

In an opinion rendered on November 15, 1933, No. 8215, Vol. XVIII, page 8 on the question of Expenditure of Federal Funds granted City we said:

"When the city takes actual possession of money secured from the federal government by putting the funds in its treasury, these amounts can be withdrawn only on warrant and can be expended only in accordance with the appropriations in the annual appropriation bill.

Lump sum appropriations for a particular class of work or improvements are proper, if nothing inconsistent with the appropriations is inserted in the annual appropriation bill.

If it is required as a condition to securing federal aid that the persons who are to perform the labor be selected in a manner prescribed by the federal government, and these persons are put on such work for more than sixty days, there probably will be difficulty about their employment in so far as it conflicts with the Civil Service act and regulations. For periods not exceeding sixty days, it is probable that these persons can be lawfully employed on the theory that an 'extraordinary exigency' exists."

In the Journal of Proceedings of the City Council December 9, 1958, we quote from page 8772:

"100 Corporate Fund

Community Conservation Board of Chicago

xxx

Code	Amounts Appropriated
.005 Salaries and Wages—on Payroll.....	\$216,428."

And from page 9173, we quote:

"No. 30 General Obligation Bond Funds—400

No expenditures shall be made from appropriations from Bond Funds for salaries and wages except for positions specifically authorized."

We cannot find in the Budget any specific appropriations for the positions you mention.

It is, therefore, our opinion that you are not authorized to classify the positions you mention in your communications.

OUTSIDE EMPLOYMENT

(No. 12312—Commissioner, Streets and Sanitation—C. H. L.—January 6, 1960.)

We are in receipt of your communication dated December 30, 1959 in which you request our opinion in regard to outside employment.

In regard to your point 1 which reads:

"1. Is the holding of an additional job which does not interfere with an employee's regular duties sufficient ground for preferring charges of dismissal of a civil service employee?"

we refer you to an opinion written by this department to Honorable Nicholas R. Finn, President, Civil Service Commission, on September 22, 1926, Corp. Coun. Op., Vol. XV, page 339, from which we quote and in which opinion we now concur:

"Complying with your request for an opinion in the matter of the right of Civil Service employees to engage in outside employment while filling an office, position or place of employment in the service of the City, we state it is our opinion that, unless the ordinances defining the service and appropriating the compensation therefor, or the Civil Service Commission's classification of, or examination for the service indicate otherwise, the presumption of law is such employee must devote his entire time to the city during its regular business and working hours. Such employee cannot, therefore, engage in outside employment at the same time."

The provisions of the Municipal Code of Chicago pertinent to the question raised here are as follows:

"25-8. The offices of the respective departments, bureaus, or other agencies of the city government, except as hereinafter mentioned, shall be open from nine o'clock in the forenoon to five o'clock in the afternoon on every day except Sunday, New Year's Day, Lincoln's birthday, Washington's birthday, Good Friday, Memorial Day, Fourth of July, Labor Day, Columbus Day, Armistice Day, Thanksgiving Day and except on Saturday, when they shall be open from nine o'clock in the forenoon to twelve o'clock noon."

"25-9. Eight hours of labor shall be and constitute a day's work for all employees performing manual labor for the city * * *"

"25-27. The head of each department, * * * shall prescribe such rules and regulations for the governance of his department * * * as he shall deem necessary and proper * * * and employees shall be subject to such rules and regulations so prescribed and to the provisions of this code."

You make no mention of any rules or regulations promulgated by your department governing the regular duties of your employees or hours of employment.

In view of the above we are of the opinion that a civil service employee who performs his regular duties during the hours prescribed by ordinance and or rules of his department cannot be discharged for cause should he hold an additional job which does not interfere with his regular duties and at other times of the day or night.

Answering your point 2, which reads:

"2. Is the owning of a tavern or other business which does not interfere with the employee's regular duties sufficient grounds for preferring charges of dismissal of a civil service employee?"

We are of the opinion that there is no provision in the Cities Civil Service Act nor the ordinances of the City of Chicago preventing a civil service employee from acquiring ownership in any legitimate business if such investment does not interfere with the employee's regular duties during working hours as set out in the opinion above cited, and concurred in, and the sections of the Municipal Code of Chicago quoted herein under your point 1.

FALSIFICATION OF APPLICATION

(No. 12315—Corporation Counsel—R. L. C.—January 14, 1960.)

Your memo of January 8, 1960 inquires as to whether the City can sustain a discharge proceeding against a certified Civil Service employee based upon that employee's falsification of answer to questions in his original application.

I believe that a review of the following authorities compels an affirmative answer to your question.

Rule II Section 6 of the Civil Service Rules reads as follows:

"Disqualifications. *Proof of false statements made in any application* or in any experience rating sheet or other statement given in an examination or of the violation of any statute or of any rule, regulation or instruction of the Commission pertaining to an examination, or of bad character, dissolute habits, immoral conduct, or of dismissal for cause from any public service shall be grounds for excluding an applicant from any examination or for omission or removal from an eligible register, or for dismissal from the service after certification".

As a rule promulgated pursuant to statutory directive or authority, the above provision has the same effect and weight as the Civil Service Act itself (*Cartan v. Gregory*, 329 Ill. App. 307, *Lindblom v. Doherty*, 102 Ill. App. 14).

The pattern for judicial thinking in Illinois on the question of misrepresentations on a Civil Service application seems to have been set by the language used in the matter of *People v. Allman*, 396 Ill. 35, 71 NE 2d 44. In that case the court, in declaring unconstitutional a statute which provided that no person certified to civil service status who was entitled to military preference shall be discharged because he misstated his age, declared:

"No case presented by counsel even squints at approval of a fraudulent misstatement in order to obtain an examination and position to which he was not entitled. The attempt of the General Assembly to grant him immunity from the consequences of his fraudulent act is repugnant not only to the constitutional provisions against granting special privileges and immunities to favored classes, but is likewise repugnant to basic morality".

Although this case is not on point with your query, the language has been specifically cited with approval in Civil Service cases regarding discharge for misstatements regarding education (*People ex rel. Kirch v. Hurley*, 16 Ill. App. 2d 503, *People ex rel. Heffernan v. Smykal*, 13 Ill. App. 2d 342), and misstatements regarding former city employ (*Rose v. Civil Service Com-*

mission, 14 Ill. App. 2d 337). I hasten to add that although these cases are not factually identical to the problem you cite, their treatment of the false statement aspect may, I believe, be logically extended to the problem at hand.

What I believe to be a factually identical situation to that before us is treated in *Stanulus v. Budd* (1 Ill. App. 2d 334, 117 N. E. 2d 665.) Here the petitioner was hired in 1946 by the Chicago Surface Lines and discharged after a hearing by the Chicago Transit Board in 1952 for the reason that he falsely answered, in his original application for employment, that he had never been arrested. It was argued on behalf of petitioner that the statutory language authorizing discharge for "cause which is detrimental to the service" should be construed as requiring official misconduct, misfeasance or maladministration in office in contrast to a "shortcoming in the personal character or fitness to hold his position." In affirming the Board's discharge the court noted,

"It is fair to conclude that an employer has the right to expect of his employees, *regardless of the kind of work performed by them*, the qualities of truthfulness, honesty and integrity, and it would follow that the lack of such qualities would be detrimental to the operation of an employer's business."

A "general rule" is stated in 10 Am. Jur. Civil Service sec. 11 (Cum. Supp. 1957) to the effect that though a civil service appointment is final after the probationary period has expired, an appointment may be set aside, regardless of the statute, where the appointment was obtained by fraud. No cases are cited to this rule. However, when the language in *People ex rel. Krich v. Hurley*, 16 Ill. App. 2d 503,

"we assume that the Civil Service Act presupposes a corps of civil servants bound to the basic moral precept that false statements cannot be justified as a means to qualify for civil service status"

is read in the light of the language in *Harrison v. Civil Service Commission*, 347 Ill. App. 405 reversed 1 Ill. 2d 137.

"We are not impressed with the argument that any transgression in the past life of a civil service employee must be discovered by the Civil Service Commission prior to promotion else the Civil Service Commission is powerless to discipline an employee for offenses secretly committed, concealed and discovered only after promotion."

it appears that Illinois is conclusively committed to the proposition that *regardless of certification or time lapse a false statement in the original application is "cause for discharge."* See also *People ex rel. Lane v. Lindblom*, 215 Ill. 58, where the court held admission as to misstatement of age on original application was a complete defense to petition for reinstatement.

Additional authorities:

Sinkevich v. Nashua Police Commissioner, 86 A. 2d 562 (N. H.)
(False statement as to previous arrest).

Glenn v. Chambers, 48 N. W. 2d 275 (Iowa)
(Fraud of appointee).

Application of Katz, 23 N. Y. S. 2d 150
(Misstatement of age.)

Opinion of Corporation Counsel, Vol. 18, p. 205
(False statement as to citizenship).

Opinion of Corporation Counsel, Vol. 21, p. 59
(False statement as to citizenship).

RESIDENCE REQUIREMENTS

(No. 12320—Commissioner of Streets and Sanitation—H. H. P.—February 5, 1960.)

We have your letter of February 2, 1960, in which you state that because thirty-three truck drivers assigned to the Bureau of Sanitation have been reported, or are suspected of living outside the limits of the city of Chicago you have notified them that the Bureau "will require that their addresses be the same for mailing, chauffeur license, voter registration and if they admit to owning a car that the address given, likewise be the same."

You request our opinion on "whether the action taken and the regulations insisted upon by this Bureau are adequate and technically correct."

Since the subject matter of your letter is the suspicion that such truck drivers are living outside of Chicago in violation of the Municipal Code of Chicago, we assume that your inquiry regarding "adequate action" means that if each truck driver's address for mailing, etc., is the same and in Chicago, then proof of Chicago residence is established and no further inquiry need be made by you.

Section 25-30 of the Municipal Code of Chicago provides:

"All * * * employees in the classified civil service of the city shall be actual residents of the city. Any employee in the classified civil service of the city who shall fail to comply with the provisions of this section shall be discharged from the service of the city in the manner provided by law."

You will note that section 25-30 provides that civil service employees must be *actual residents* of Chicago.

The dictionary defines "resident" as "one who resides in a place", and "resides" as to "dwell permanently."

In order to be an actual resident of Chicago, an employee would have to fall within the foregoing definitions. Thus, whether an employee is an *actual resident* of Chicago is a question of fact.

In our opinion, because an employee's mailing address, etc., are the same and in Chicago, is no proof that such employee is an *actual resident* of Chicago. Therefore, in our opinion the action you have taken is not adequate or technically correct.

Chapter 19 of the Municipal Code of Chicago sets up a Chicago Department of Investigation. This Department of Investigation is authorized to conduct an investigation to ascertain the affairs, etc., "of the personnel of any city agency" (Section 19-5).

You may avail yourself of the services of the Department of Investigation to ascertain whether the suspected employees are *actual residents* of Chicago.

PROMOTIONAL CERTIFICATION OF THREE NAMES

(No. 12332—Superintendent of Police—C. H. L.—April 26, 1960.)

We acknowledge receipt of your memorandum dated March 21, 1960, in which you quote Section 9 of the Cities Civil Service Act:

"* * * it shall be the duty of the Commission to submit to the appointing power the names of not more than three applicants for each promotion having the highest rating."

You say that:

"Present Commission practice in filling multiple vacancies is to certify only two more names than the number of vacancies, e.g. twelve names for ten sergeant vacancies."

Section 9 of the Cities Civil Service Act providing for promotions is correctly quoted by you in your communication.

And Rule IV, Section 1 of the Civil Service Commission pertaining to promotions reads:

"Section 1. Requisitions. Requisitions for certification shall be upon forms prescribed by the Commission and shall specify the title, branch, class, grade or rank, general duties and compensation of the position to be filled. Where vacancies are to be filled from a promotion register, the Commission shall certify same to the appointing officer the names of the three standing highest on such register, and where there are less than three names thereon, the Commission shall certify same to the appointing officer who shall appoint one of those so certified."

Section 9 has been construed by the Appellate Court in *Peo. ex rel. Lynch v. City of Chicago*, 271 Ill. App. 360 at page 371 as follows:

"Furthermore, inasmuch as the position of sergeant of police is a promotional one, it is governed by section 9 of said act, Cahill's St. ch. 24, par. 693, one of the provisions of which is that, 'it shall be the duty of the commission to submit to the appointing power the names of *not more than three* applicants for each promotion having the highest rating.' This is the authority for the commission to submit the names of *three* applicants for each promotion, so as to give a discretion to the appointing power as to which of the three shall be appointed. (See *McDevitt v. Finn*, supra.) And, clearly, under these provisions of the section, the commission should not be compelled to certify the name of but *one*." (Italics ours).

Answering your query as to whether "the Commission's practice in filling multiple vacancies by certifying only two more names than the number of vacancies, e.g. twelve names for ten sergeant vacancies" and your query as to whether "the laws could be interpreted to permit the certification of 30 names, which is three for each vacancy"? we refer you to Rule IV, Sections 2 and 4 of the Commission's Rules which provide:

"Section 2. Certification. A written notice, upon blanks prescribed by the Commission shall be mailed to the eligible, at his latest address as shown by the records of the Commission, stating that his name has been certified to the appointing officer. A similar notice shall be sent to the appointing officer, containing the name of the eligible certified.

"Section 4. Waiver. A person certified or tendered reinstatement must report to the head of the department or appointing officer within five days from the date of certification and in case of failure to report, his name shall be removed from the eligible register. * * *

From the above you will notice that every person certified has five days in which to waive appointment if he so desires, which could delay the procedure of filling vacancies under the practice of the Commission as stated by you.

You ask whether the Commission's practice has been tested in the courts of Illinois.

Answering this question we refer you to a case in point, the case of *McDevitt v. Finn*, 248 Ill. App. 339, where three vacancies were to be filled

from a promotional list for the position of district superintendent in the bureau of engineering, and the court said at pages 342, 343:

"Without regard to the necessity of said Commissioner sending to the Commission a separate request for each promotion to be made, we think it clear, in view of the provisions of the act above mentioned, that the Commission properly certified a list of three names for one promotion, and, an appointment having been made to one of the three submitted, properly certified another list of three names for another promotion and so on. And we think that of each list submitted the commissioner of public works was clothed with the discretion of choosing from the list for appointment any one of the three persons named. Having such discretion, while he may be compelled to act, he cannot by mandamus be compelled to act in a particular manner. (People v. Webb, 256 Ill. 364, 373.)" (Italics ours.)

SENIORITY AS A PROMOTIONAL FACTOR

(No. 12335—President, Civil Service Commission—C. H. L.—April 28, 1960.)

We are in receipt of your communication dated March 21, 1960, asking for our opinion in certain matters relating to seniority, certifications from promotional eligible lists, your authority to discharge an employee after completion of his probationary period, etc., and after consulting with your Mr. Charles Pounian we shall write you a separate opinion on each matter.

We, therefore, in this letter give you our opinion on your first query which reads:

"1. Must the Commission always use seniority as one of the factors to be considered in promotional examinations?"

Section 3 of the Cities Civil Service Act provides:

"Section 3. Classification. Said commissioners shall classify all the offices and places of employment in such city with reference to the examinations hereinafter provided for, except those offices and places mentioned in Section 11 of this act. The offices and places so classified by the commission shall constitute the classified civil service of such city; and no appointments to any of such offices or places shall be made except under and according to the rules hereinafter mentioned."

Section 3 of the Cities Civil Service Act thus commands the Civil Service Commissioners to classify all offices and places of employment in the City affected with reference to examinations and provides that no appointments shall be made to such offices and places except in accordance with the rules of the Commission, *Peo. ex rel. Cashin v. Gregory*, 330 Ill. App. 172, Dec. 31, 1946.

Section 4 of the Cities Civil Service Act provides:

"Section 4. Rules. Said commission shall make rules to carry out the purposes of this act, and for examinations, appointments and removals in accordance with its provisions, and the commission may, from time to time, make changes in the original rules."

And Section 6 of the said Act provides that:

"Section 6. The commission shall control all examinations. * * *

The courts have held that the Civil Service Commission has only such power as is given it by Statute. It operates under rules made by it under authority of said Section 4 and its acts complying with the purposes of said Section are as binding on it as though made by the Legislature, *People ex rel. Vergewist v. Gregory*, 337 Ill. App. 661 (1949), *Peo. ex rel. Gilbert v. Hurley*, 336 Ill. App. 205 (1948), *Lindblom v. Doherty*, 102 Ill. App. 14, 29 (1902).

Bearing the aforesaid statutory provisions and court rulings in mind, we shall now proceed to answer your first query as follows:

The portion of Section 9 of the Cities Civil Service Act which pertains to seniority in service reads:

"Section 9. Promotions. The commission *shall*, by its rules, provide for promotions in such classified service, on the basis of ascertained merit and *seniority in service* and examination and shall provide, in all cases where it is practicable, that vacancies shall be filled by promotion. * * *" (italics ours.)

Rule III, Section 7, of the Civil Service Commission's Rules provides:

"Section 7. Scope of Subjects. The subject of examinations *may* include duties of positions, educational tests, aptitude tests, practical tests, performance tests, manual tests, personality tests, courtesy and discipline tests, reports, discussions or theses, statements of experience, tests of knowledge of civil government, tests of knowledge of the City of Chicago, tests of knowledge of laws and ordinances, ascertained merit or efficiency, *seniority* or service, medical examinations, physical tests, or any or all of them, and such subjects may be given in whole or in part in the form of a written test, or an oral test, or an ocular demonstration, or a performance test, or a manual test, or other practical tests, or any or all of them, according to the schedules of subjects with weights assigned, set forth in the published notices of examinations or as provided therein." (Italics ours.)

It will be noted that this Section makes it discretionary with the Commission to include seniority in the subject of examinations, which does not conform with the provisions of Section 9 of the Cities Civil Service Act above quoted.

Rule V of the Civil Service Commission's Rules provides:

"Section 1. Method of Promotion. Promotion shall be accomplished by means of competitive examination, including such subjects and weights, hereinbefore provided for in these rules, as the Commission may prescribe, and in addition thereto, the Commission shall investigate and ascertain the merit or efficiency in service of the persons submitting themselves to examination, rating such merit or efficiency on the scale of 100 and assigning proportionate weight thereto. *The Commission shall also ascertain a proper award on account of seniority of service of the persons* submitting themselves to examination, in accordance with a subsequent provision of this rule, and *said seniority rating* together with ascertained merit or efficiency rating, and examination rating shall be combined and averaged so as to compute the general average standing of all applicants for promotion. The name of no person shall be entered upon a promotion register whose general average shall be less than 70 per cent of complete proficiency in examination, ascertained merit or efficiency taken as a whole." (Italics ours.)

"Section 3. Seniority. Credit for seniority *shall* be given only for actual service in the rank or grade from which promotion is sought, whether such service has been continuous or not. Seniority shall be computed as of the date of examination. The average marking to be

entered for seniority shall be obtained by adding to a standard mark of 70, as follows:

For the first six months.....	0
For each full month of the second six months.....	½
For the second full year.....	3
For the third full year.....	4
For the fourth full year.....	4
For the fifth full year.....	3
For the sixth full year.....	3
For the seventh full year.....	2
For the eighth full year.....	2
For the ninth full year.....	2
For the tenth full year.....	2
For each additional year of service after ten years (maximum 14 years)	½"

The above Rule V, Sections 1 and 2 of the Civil Service Commission's Rules conforms with the provisions of Section 9 of the Cities Civil Service Act.

When we consider that the foundation principles of the Cities Civil Service Act are that appointments must be made according to merit and fitness (*Akin v. Kipley*, 171 Ill. 44 (1898), *McSweeney v. Collins*, 276 Ill. App. 1 (1934)) and that the object of said Act is to increase the efficiency of the public service to the end that public safety may not be imperiled, *Peo. v. Stevenson*, 270 Ill. 569, 573 (1915), it is, in our opinion, evident that the legislature intended to make it mandatory on the Civil Service Commission to provide by its rules for promotion on the basis of ascertained merit and seniority in service.

You are, therefore, advised that, in our opinion, it is your duty to always use seniority as one of the factors to be considered in promotional examinations.

CHARGES—TIME REQUIREMENT

(No. 12340—President, Civil Service Commission—C. H. L.—May 20, 1960.)

We acknowledge receipt of your communication, dated May 13, 1960, in which you say that our opinion of April 29, 1960, in regard to the Commission's authority to discharge an employee after the completion of his probationary period if he falsified his arrest record on his application was very helpful, and then you ask for our opinion on the matter, of laches which was not mentioned in Honorable Dolores L. Sheehan's letter of March 21, 1960.

You say that some clarification is needed on this point, when you ask:

"* * * but is there any time period within which the department head must act after he is informed that an employee has falsified his application? Does laches apply in this situation?"

We are here dealing with an employee who falsified his application.

At the outset he, therefore, is subject to removal under Rule II, section 6 of the Civil Service Commission's Rules which provides:

"Section 6. Disqualifications. Proof of false statements made in any application or in any experience rating sheet or other statement given in any examination or of the violation of any statute or of any rule, regulation or instruction of the Commission pertaining to any examination, or of bad character, dissolute habits, immoral conduct, or

of dismissal for cause from any public service shall be grounds for excluding an applicant from any examination, or for omission or removal from an eligible register, or for dismissal from the service after certification, * * *."

and as held in *Planderleith v. Glos*, 329 Ill. 382:

"It is a familiar maxim of equity that no one who comes into court shall be permitted to take advantage of his own wrong, * * *"

Answering your query we wish to advise you that there is in the Cities Civil Service Act no restriction as to the time charges against an employee shall be filed by the head of a department or heard by the Civil Service Commission.

The precise question here involved has never reached the higher courts of the State, and an examination of the authorities reveals no case exactly in point.

Our Supreme Court has given a good definition of laches in *Carroll v. Houston*, 341 Ill. 531, on page 538:

"Laches consists of such neglect or omission to assert a right as, taken in conjunction with lapse of time more or less great and other circumstances causing prejudice, operates as a bar (*Ring v. Lawless*, 190 Ill. 520; *Morse v. Seibold*, 147 id. 318)."

Bearing in mind that the essence of laches is estoppel, we quote from *Peo. ex rel. Hadelman v. Superior Petroleum Co.*, 372 Ill. 546, wherein the Court held:

"Does this statute bar the State of Illinois from a recovery? We said in *People v. Brown*, 67 Ill. 435: 'It is a familiar doctrine, that the State is not embraced within the Statute of Limitations, unless especially named, and, by analogy, would not fall within the doctrine of estoppel. * * * The doctrine is well settled that no laches can be imputed to the government and by the same reasoning which excuses it from laches, and on the same grounds, it should not be affected by the negligence or even the wilfulness of any one of its officials.'

This principle has been adhered to in numerous later cases. (*People v. Pullman's Palace Car Co.*, 175 Ill. 125; *People v. Gary*, 196 id. 310; *Brown v. Trustees of Schools*, 224 id. 184; *People v. Commercial Union Fire Ins. Co.*, 322 Id. 326.)"

We also wish to call your attention to the case of *Logan County v. Lincoln*, 81 Ill. 156, wherein the Court said at page 159:

"It would be a pernicious doctrine to establish that public rights of municipalities could be cut off by the neglect of the appointed officers for an unreasonable time to enforce them. * * * But mere non-action of its officers is not sufficient to work an estoppel as against a municipal corporation."

Other cases holding that mere lapse of time does not estop the people are:

People v. Hartquist, 311 Ill. 127.

People v. Bussinger, 324 Ill. 534.

People v. Morris, 365 Ill. 471.

We infer from your letter that the department head has been informed that the employee here involved has falsified his application. If this be the case it behooves the department head to act with reasonable dispatch after he has been so informed.

We are of the opinion from the decided cases that laches does not apply to the Municipal Corporations.

PENSIONER AS EMPLOYEE

(No. 12342—Civil Service Commission—C. H. L.—May 25, 1960.)

In your memorandum of April 29, 1960, you request our opinion as to the status of P..... S. F..... who was a patrolman from March 21, 1922 until May 8, 1951, when he resigned and is now receiving a monthly pension of \$113.98 from the Police Pension Fund. You ask whether he is now, as an employee of the Bureau of Architecture, drawing a salary of \$390 per month as a janitor, entitled to draw the aforesaid pension from the Police Pension Fund.

In response to your query, we refer you to the case of *Kelly v. Retirement Board of Firemen's Annuity and Benefit Fund*, 292 Ill. App. 390, where the court held that Kelly, an engineer in the Fire Department who had retired and was receiving a pension from the Firemen's Annuity and Benefit Fund was permitted to draw salary as an employee of the Board of Education and at the same time continue to draw his pension, holding that the phrase "reenter the service," as used in the annuity and benefit fund acts, refers to and means the same service in which a person has earned the annuity or pension.

In accordance with foregoing decision, it is our opinion that F....., not having reentered police services, for which he is now drawing a pension, but now being employed in an entirely different department, has the right to be employed as a janitor in the Bureau of Architecture and draw his pension from the Police Pension Fund.

LEAVE OF ABSENCE FOR HIGHER TEMPORARY POSITION

(No. 12343—President, Civil Service Commission—C. H. L.—May 26, 1960.)

Answering your communication dated May 16, 1960, on the above subject (Leave of Absence), please be advised that Section 12 of the Cities Civil Service Act provides that no civil service officer or employee shall be removed or discharged except for cause after a hearing before the Civil Service Commission.

Such an employee gains civil service status after passing through his original probationary period, and he retains such status until he is properly removed or discharged, no matter what civil service position he thereafter holds, or if he is on an eligible list or reinstatement list or holds a temporary position.

In other words, he is in the classified service since the day his probationary period expired although his civil service status will change with examinations and appointments.

Your query reads:

"Assume that a person has entered the city service through an original appointment, completed his probationary period, taken a promotional examination and has been promoted with civil service status.

Some time subsequent to the promotion he has gone on leave of absence to a higher position on a temporary authority. He then takes another promotional examination and is successful.

How long must he serve in the new position before he can again go on leave of absence to the higher position on a temporary authority and still retain civil service status in the new position?"

We take it that the party you have in mind, after having taken his first promotional examination under Rule VIII, Section 3 of the Civil Service Commission's Rules served in that position for not less than three months and then took a leave of absence to fill a higher position under temporary authority.

He then takes another promotional examination and you say he is successful. You do not say, however, that he was appointed to that promotional position.

The Civil Service Commission's Rule IV, Section 2, provides:

"Section 2. Certification. A written notice, upon blanks prescribed by the Commission shall be served to the eligible, at his latest address as shown by the records of the Commission, stating that his name has been certified to the appointing officer. A similar notice shall be sent to the appointing officer, containing the name of the eligible certified. Employees accepting certification from a promotion register are thereby permanently separated from the position formerly held by them. * * *

and Rule IV, Section 4 of the Commission's Rules provides:

"Section 4. Waiver. A person certified or tendered reinstatement must report to the head of the department or appointing officer within five days from the date of certification and in case of failure to report, his name shall be removed from the eligible register. * * *"

From the above rules of the Commission it is apparent that he must be certified to the new promotional position, and if he accepts certification he is then permanently separated from the position formerly held by him, and that after his certification it is his duty to report to the head of his department or appointing officer within five days from the date of certification, and that if he fails so to report, his name shall be removed from the eligible register.

After his appointment and in accordance with said rules he then enters into an entirely different civil service status, and we are of the opinion that it is the duty of the Civil Service Commission to enforce that part of Rule VIII, Section 3 of its Rules reading:

"Section 3. Leave of Absence. The head of a department may grant leave of absence to an officer or employee, who has been in the classified service for not less than three months, for such a period as he sees fit, not exceeding one year. * * *"

We are informed that the Civil Service Commission has followed such practice during the years.

B. SALARIES

SALARY DURING SUSPENSION PERIOD

(No. 11789—Commissioner of Police—C. H. L.—February 18, 1954.)

We are in receipt of your letter dated February 8, 1954 in which you ask our opinion in the matter of Captain Redmond P. Gibbons' request for back pay for the period August 25, 1953 to December 25, 1953.

You say that he was suspended from duty on August 25, 1953 and restored to duty on December 25, 1953.

Section 12 of the Cities Civil Service Act provides that:

"Nothing in this act shall limit the power of any officer to suspend a subordinate for a reasonable period, not exceeding thirty days."

The power therein given the head of the Department of Police to suspend operates not only to sever the subordinate employee from the service but to deprive him of the salary of his position during the period of suspension.

Captain Gibbons has therefore no right of recovery for salary during the suspension period August 25, 1953 to September 24, 1953.

We are informed by the Civil Service Commission that on September 9, 1953, Captain Gibbons signed a waiver of salary from September 9, 1953 to October 6, 1953, the hearing having been continued at his request.

He is therefore not entitled to any back salary up to and including October 6, 1953.

As to the balance of the time for which Captain Gibbons seeks recovery of salary, October 7, 1953 to December 25, 1953, it is our opinion that the City has the right to reduce the amount owing him for that period by any outside earnings he may have received during that time in view of the language of our Supreme Court in the case of *Kelly, et al. v. Chicago Park District*, 409 Ill. 91 where the court held at page 98:

"While plaintiff's right of compensation does not grow out of a contractual relation, it does, unlike that of an officer, grow out of a rendition of services. We see no basis for a finding that plaintiffs are entitled to be paid for their services twice, when none were performed. It is our view that the appellate court erroneously held that plaintiffs' salaries could not be reduced by earnings from outside employment."

In conclusion, if you cannot ascertain that Captain Gibbons had any outside earnings during the period, i.e. October 7, 1953 to December 25, 1953, he is entitled to his back salary for that period.

SALARY INCREASE DURING TERM

(No. 11890—Purchasing Agent—A. F. G.—March 29, 1955.)

In your letter of January 28, 1955 you state that your salary check for the first two weeks of January 1955 shows an increase of approximately \$100.00 over prior payments. You call attention to the fact that in the annual appropriation ordinance for 1955 your salary was increased by \$3500.00.

You request that we review the law concerning the salary requirements of your position and advise you if you may retain the difference between the salary you have been receiving and the increased amount provided for in the current budget. You state that you are depositing this difference in a separate account in your bank pending a determination of the question.

The office of purchasing agent is created by "The Municipal Purchasing Act for cities in excess of 500,000 population" (Article 22A of the "Revised Cities and Villages Act", and was in effect January 1, 1948.) Section 22-A-15 of that article provides in part as follows:

"In all municipalities within the purview of this Article there shall be a purchasing agent who shall be appointed by the mayor by and with the consent of the corporate authorities of said municipality. Said purchasing agent shall hold office for a term of four years and until his successor is appointed and qualified. * * * This salary shall be fixed by the corporate authorities and he shall be required to give bond with adequate security for the faithful performance of his duties in an amount to be determined by the corporate authorities. * * *

Article 21 of the "Revised Cities and Villages Act" is the "Little Charter" of the City of Chicago. Section 21-7 of that Article is in point as follows:

"The compensation of all officers shall be by salary. * * * The city council shall fix the salaries of all officers, *except those who are elected or appointed for a definite term fixed by statute* in the annual appropriation ordinance and those salaries shall not be altered during the same fiscal year. The city council, by ordinance *other than the appropriation ordinance*, shall fix the compensation for each officer *who is elected or appointed for a definite term fixed by statute* and his salary shall not be increased or diminished during his term of office. * * *." (Emphasis ours.)

You were last appointed purchasing agent in January 1952 for a term of four years ending January 1, 1956. The term of your office is four years and is fixed by statute. Under section 21-7 quoted above your salary cannot be increased or diminished during your term which does not end until January 1, 1956. Also under that section the city council is required to fix the salary of each officer who is elected or appointed for a definite term, by ordinance other than the appropriation ordinance and in our opinion the attempt on the part of the city council to increase your salary for the year 1955 in the appropriation ordinance is without legal effect.

We are advising the city comptroller that your salary for 1955 should be computed at the rate prevailing during 1954, and payments made in excess of that rate should be refunded.

SICK LEAVE

(No. 12007—Superintendent, Municipal Tuberculosis Sanitarium—C. H. L.—January 30, 1956.)

We have before us your communication dated December 7, 1955 in which you state:

"The above named employee expired on November 18, 1955. On November 10, 1955, the Board of Directors of the Municipal Tuberculosis Sanitarium approved a sixty (60) day sick leave with pay covering the period September 5 to November 3, 1955, which amounts to \$1,711.40. In a letter dated November 18, 1955, (the same day that

Dr. Ragins passed away) the Finance Committee also authorized this 60 day sick leave.

Please advise us whether we can legally pay this 60 days, and if so, who is the payee?"

We have examined the Vacation and Sick leave order passed by the City Council on December 1, 1955 (C. J. pp. 1499-1500) and find that the Municipal Tuberculosis Sanitarium is exempt from the effect and operation of that order.

We are informed that for the last few years the Finance Committee of the City Council has operated under a policy concerning the payment of salary to employees who are sick or ill and whose sick leave has been exhausted. (This policy pertains especially to employees who have served the City for many years.) The operation of this policy is that the department head addresses a letter to the Chairman of the Committee on Finance explaining the reason of the employee's request for payment of salary for a stated time i. e. 30 days to 60 days.

After the approval by the Chairman of the Committee on Finance the department receives a reply granting the request. Several requests may be made for this purpose subject to the discretion of the department head.

In view of the fact that the Finance Committee has authorized the 60 days sick leave involved, you are authorized to pay said sick leave.

The payment must be made to the legal representative of Dr. Ragins' estate.

SALARY OF MUNICIPAL COURT JUDGES

(No. 12060—City Comptroller—S. R. D.—July 24, 1956.)

We acknowledge receipt of your letter of July 10, 1956, in which you state that on June 28, 1956, an ordinance was passed fixing the annual salary of the chief justice elected for the term ending in 1966 at \$22,000 and the associate judges whose terms expire in 1962 at \$17,000 per annum. You request our opinion as to "whether or not the new judges in December, 1956, may be paid the salaries provided by the ordinance of June 28, 1956, or whether, during the month of December, 1956, the salaries must be paid at the rate provided in the 1956 budget."

Section 8 of the Municipal Court of Chicago Act (Ill. Rev. Stat. 1955, chap. 37, par. 363) provides, in part, as follows:

"The salary of the chief justice shall be \$15,000 per annum and the salary of each of the associate judges shall be \$10,000 per annum, and such salaries may be increased from time to time by ordinance of the city council; Provided, that the salary of no judge shall exceed the salary and compensation fixed, from time to time, by law for a judge of the Circuit Court of Cook County, and that the salary of no judge shall be increased or diminished during the term for which he shall have been elected."

Section 9 of the Act provides, in part, as follows:

"The judges so required to be elected shall enter upon the discharge of their duties on the first Monday of December following their election."

From the foregoing provisions of the statute, it is apparent that the salary of the Chief Justice and Associate Justices of the Municipal Court of Chicago may be increased from time to time by ordinance of the City Council; that their salary shall not be increased or diminished during the term for which elected; and that the said judges take office on the first Monday of December following their election.

The ordinance of June 28, 1956 (Journal of the Proceedings of the City Council of the City of Chicago, Illinois, page 2904) provides as follows:

SECTION 1. Section 25-5 of the Municipal Code of Chicago is amended by striking out the following:

"The annual salary of the chief justice and associate judges of the Municipal Court of Chicago elected or appointed, as required by law, for a term ending in the year 1958 or thereafter are hereby fixed as follows:

Chief justice	\$19,500.00
Associate judge	14,500.00'

and substituting therefor the following:

"The annual salary of the chief justice of the Municipal Court of Chicago elected or appointed as required by law for a term ending in the year 1966 or thereafter, and the annual salary of the associate judges of the said court elected or appointed as required by law for a term ending in the year 1962 or thereafter are hereby fixed as follows:

Chief justice	\$22,000.00
Associate judge	17,000.00'

SECTION 2. This ordinance shall become effective upon its passage and publication."

Section 25-5 of the Municipal Code of Chicago, a part of which was amended by the foregoing council proceeding, further provides as follows:

"The salaries of all officers and employees of the city, not otherwise fixed, shall be determined and fixed by the city council in the annual appropriation ordinance."

Section 25-6 of the Municipal Code of Chicago provides as follows:

"The salaries and pay of all officers and employees shall be due and payable semi-monthly to each person entitled thereto, in the manner prescribed by the rules and regulations of the department of finance."

From the foregoing statutory and ordinance provisions, it is apparent that beginning with the first Monday of December, 1956, the Municipal Court judges elected at the November, 1956, election are entitled to the annual compensation provided for in the amendment of June 28, 1956. However, it is also apparent that said amendment does not appropriate any additional moneys to pay these increased salaries.

Appropriations of moneys for the payment of salaries can only be provided for in the Annual Appropriation Ordinance. Section 22-1 of the Cities and Villages Act (Ill. Rev. Stat. 1955, chap. 24, par. 22-1) pertains to the Executive Budget and the Annual Appropriation Ordinance resulting therefrom. It provides, in part, as follows:

"In municipalities with a population of more than 500,000, the corporate authorities shall pass an ordinance within the last sixty days of each fiscal year, to be termed the annual appropriation ordi-

nance * * * to defray all necessary expenses and liabilities of the municipality to be paid or incurred during the next fiscal year.

* * * * *

Except as otherwise specifically provided by law, no further appropriations shall be made prior to the passage of the next succeeding annual appropriation ordinance."

The exceptions for further appropriations provided by law pertain to supplemental appropriation ordinances for the years 1951, 1952, 1953, and 1955. The exceptions do not pertain to the Annual Appropriation Ordinance for in the 1956 Annual Appropriation Ordinance. The difference between the salary due and the salary paid should be provided for in the 1957 Annual Appropriation Ordinance and paid in 1957.

We therefore have a situation where there is an ordinance providing for an increase in salary for certain judges of the Municipal Court beginning with the first Monday of December, 1956, without any moneys appropriated in the 1956 Annual Appropriation Ordinance for the payment of such increase. Under such circumstances, we are of the opinion that the salary due in December, 1956, should be paid at the rate of pay appropriated for in the 1956 Annual Appropriation Ordinance. The difference between the salary due and the salary paid should be provided for in the 1957 Annual Appropriation Ordinance and paid in 1957.

SENIORITY RIGHTS FOR MILITARY SERVICE

(No. 12140—Civil Service Commission—C. H. L.—July 18, 1957.)

We herewith acknowledge receipt of your letter of June 27, 1957, requesting our opinion as to procedure to follow in so far as salary is concerned in reinstating a returned service man on military leave.

You ask whether an employee who leaves for active military service and who subsequently is reinstated to a position previously held by him, is entitled to receive the salary or wage rate step in the range to which he normally would have been entitled had his service to the City not been interrupted by entry into the armed forces.

Chapter 24½ Ill. Rev. Stats. 1955, page 957 provides:

"MUNICIPAL EMPLOYEES INDUCTED INTO LAND OR NAVAL FORCES

* * *

151. Restoration to position without loss of seniority.) § 2. Any employee holding a position by virtue of any Act governing the civil service of such municipal corporation who enlists or has been or may be ordered to active Federal service, State military or naval service or inducted into the land or naval forces of the United States as provided in Section 1 of this Act may be considered as being on furlough or leave of absence during his period of training and service and for forty days after he is relieved from such training and service as provided in the Selective Training and Service Act of 1940, the Army Reserve and Retired Personnel Service Law of 1940, or other Acts of Congress, and, unless incapacitated from the performance of his duties thereof, may be restored to such position without loss of seniority or to such other position as his civil service status would have entitled him had he been continuously in the active service of such municipal corporation during the period of such furlough or leave of absence. As amended by act approved June 9, 1943. L. 1943, vol. 1, p. 445."

We are of the opinion that, under the provisions of the aforesaid Act, it is your duty to give a person who was on furlough or military leave the same credit for seniority as he would have been entitled to had he stayed in the service of the City during such furlough or military leave; and from the date of his return from such furlough or military leave and his reinstatement to his position in such status to allow him the salary or wage rate step he is accordingly entitled to, under the appropriation ordinance of the City Council of the City of Chicago, for the year of his reinstatement.

COMPENSATION FOR ABSENTEE JUROR

(No. 12163—*Executive Assistant, Chief Justice of Municipal Court—S. R. D.—September 25, 1957.*)

We acknowledge receipt of your letter of September 23, 1957, in which you state that a woman juror, while returning to jury duty on September 12, 1957, slipped and fell on the first floor of the City Hall, and that because of her injury she was unable to complete her period of jury service which was to terminate on September 20, 1957. You request our opinion as to whether the juror is entitled to the payment for the entire period of jury duty or only for the days actually served.

Section 25 of the Act in relation to the Municipal Court of Chicago (Ill. Rev. Stat. 1955, chap. 37, par. 380) provides in part as follows:

"That the petit jurors for the trial of cases in said municipal court shall be provided by the jury commissioners of the County of Cook in the same manner and from the same list, as near as may be, as petit jurors are provided for the circuit, superior and criminal courts of Cook County. * * * and the fees of said jurors shall be paid out of the county treasury upon the certificate of the clerk of said municipal court."

Section 44 of the Fees and Salaries Act (Ill. Rev. Stat. 1955, chap. 53, par. 62) provides in part as follows:

*"Each county shall pay to grand and petit jurors for their services in attending courts of record * * * the sum of four dollars (\$4.00) for each day of necessary attendance at such court of jurors, and in counties of the second and third classes such jurors shall receive the sum of five dollars (\$5.00) for each day of necessary attendance. Provided, however, that in all counties the county board may fix such jurors fees at an amount not to exceed seven dollars and fifty cents (\$7.50) for each day's service."* (Italics ours.)

It should be noted that the foregoing statutory provision for jurors compensation provides for payment for services in attending courts of record for each day of necessary attendance. It would therefore appear that payment is conditioned on attendance in court.

In *Moseley v. Turner* (1900), 95 Ill. App. 215, the court, in construing the foregoing statutory provision, held that a juror was entitled to compensation for "attendance at court" although not sworn in a case on trial, saying (p. 219):

"A talesman who obeys a summons is as much under the order of the court and is as truly a juror as is a juror who is drawn in a regular panel, and although not sworn in a case on trial, is entitled to his pay as clearly as if he were in the regular panel. *Thornberg v. Herman*, 1 Nev. 401.

The word 'juror' as used in the sections of the statute quoted *supra*, is not limited to a person actually sworn to try a case. It is used in a broader sense, and embraces those who are duly summoned as jurors upon a venire regularly issued, and who obey the summons and are in attendance at court."

We are of the opinion that the juror described in your letter is entitled to compensation only for the days actually served.

ANNUITANT'S VACATION RIGHTS

(No. 12213—*Commissioner of Public Works—G. F. M.—March 26, 1958.*)

In response to the question contained in your letter of March 11, 1958, the following is submitted.

Your letter states that one John Doe was employed as a fireman in the Fire Department for a period of about twenty-nine years; that he resigned and presently is enjoying his annuity; that in May, 1955 he was certified to the Civil Service position of bridgetender in the Bureau of Rivers and Harbors; that he was laid off on November 5, 1955, reinstated May 28, 1956, and that his service record as a bridgetender is two years and five months. Your question is as to whether or not this man's period of service in the Fire Department should be considered in computing the number of weeks vacation time.

Your employee completed a term of service in the Fire Department and upon his resignation received an annuity and has continued to enjoy such annuity. He terminated all rights and benefits of his fireman job upon his separation from the fire service by reason of the acceptance of such annuity. Such employee is now employed in a new service and is receiving a salary for such service. He is, therefore, entitled to have his vacation period computed only upon the service he has rendered in his new position. To grant him a vacation period based on his service in the fire department, for which service he is receiving an annuity, and on service in his present job would, in effect, increase the annuity which he is receiving from the Firemen's Annuity and Benefit Fund, which increase would be in contravention of the Constitution of the State of Illinois (1870) Article 4, Section 19.

We are, therefore, of the opinion that the employee mentioned in your letter is entitled to have a vacation from his service as a bridgetender based only on the service he has rendered in your department.

INCREASE JUDGES' SALARIES

(No. 12214—*Chairman, Committee on Finance—J. F. G.—April 3, 1958.*)

On recommendation of the Chicago Bar Association, request has been made of the City Council to increase salaries of the judges of the Municipal Court to be elected for the term beginning on the first Monday of December, 1958.

The questions presented are whether the City Council may increase such salaries during the present year, and if the salaries of judges to be elected this year can be increased prior to the passage of the 1959 Appropriation Ordinance.

Section 9 of the Municipal Court Act provides for the election of judges in the month of November and that judges then elected shall enter upon the discharge of their duties on the first day of December following their election.

Section 8 of the Act fixes the salaries of the Chief Justice and of each of the associate judges and provides, "and such salaries may be increased from time to time by ordinance of the city council; * * * and that the salary of no judge shall be increased or diminished during the term for which he shall have been elected. Such salaries shall be paid in monthly installments out of the city treasury; * * *."

Obviously, if the salaries of the judges to be elected next November are to be increased, the City Council must pass an ordinance to become effective before the first Monday in December, 1958. The ordinance cannot provide for increase in salaries to become effective after passage of the 1959 appropriation ordinance and make it applicable to the judges to be elected in November, without violating the constitutional and statutory provisions prohibiting increases in the salaries of municipal officers and judges during the term for which they shall have been elected.

The deficiency in the appropriation for salaries of judges of the Municipal Court for the year 1958 does not bar the City Council from passing the proposed ordinance applicable to judges who will take office in December. The provision for payment of such salaries is not limited to existing appropriations. Such salaries must be paid if money is available in any fund of the city treasury and if available funds are insufficient, or if no funds are available, for the payment of such salaries for December, the city is nevertheless liable for the payment thereof and provision therefore may be made by appropriation for liabilities in the annual appropriation ordinance for the year 1959. See *People ex rel. Lyle v. City*, 360, Illinois 25.

OVERTIME COMPENSATION

(No. 12218—*City Architect*—*J. C. M.*—April 28, 1958.)

I received your letter of April 23, 1958, in which you request an opinion in respect to the use and payment of professional services of an employee of another department of the City of Chicago, said services to be performed outside of regular working hours.

Recently, I had a request of a similar nature concerning another department and I advised them that no city employee can be on two payrolls. Voucher pay as a city employee is the same as being on a payroll. In the other instance, I worked out a plan whereby the employee could be paid for overtime by his department head if the services rendered have any relation to the department. If you are able to work out such a plan with the department that you have in mind where the employees are available, I would approve such payments as overtime. However, if the professional services as architects and engineers has no connection with the department of which these employees are assigned as civil service employees, it is my opinion that the payment of such services by voucher would be illegal.

VACATION SALARY OWED DECEDENT

(No. 12262—City Comptroller—J. C. M.—January 13, 1959.)

In your letter of January 12, 1959, you refer to the Council resolution contained in Committee Pamphlet No. 23 dated December 8, 1958, which contains "regulations to govern administration of new classification and compensation plan for City employees". In Section E (2) (b) and 3 of said resolution, it is provided: "In the event the employee has not taken his vacation as provided herein, by reason of separation from service other than by discharge for cause, he, or in the event of death, his widow or estate, shall be entitled to receive his prevailing salary for such unused vacation period."

In Section E (2) (b), the number of days that an employee is entitled to as a vacation period, depending upon tenure service, are set forth. An employee who has served the City fifteen years and less than twenty-five years "shall be granted vacation at the rate of fifteen (15) work days each year; each employee who has served the City twenty-five years or more shall be granted vacation at the rate of twenty (20) work days each year". It is further provided that the vacation shall be granted at the rate of pay of the employee, coming under the provisions of the resolution.

Answering your specific questions:

1. The employee who died on January 4, 1959 with twenty years of service would be entitled to fifteen days vacation at his going rate of pay.
2. The employee who has rendered service for the City for fifty-seven years would be entitled to twenty days vacation at his going rate of pay.

Vacations are earned by reason of services rendered in the preceding year. The City Council recognized this rule when it set forth the different classifications of periods of vacation based upon years of tenure. Hence, under Section E (2) (b) 3 of the resolution, the widow or the administrator of the estate of the deceased shall be entitled to receive the prevailing salary for such unused vacation period which is the period set forth above.

DAY OFF WITH PAY

(No. 12283—City Comptroller—J. F. G.—May 13, 1959.)

Our attention is directed to Section 25-10 of the Municipal Code which provides in part as follows:

"Each and every person employed by the city who has served in the armed forces of the United States during the period of any wars in which the United States has participated shall have and shall be entitled to a vacation, with full pay on the thirtieth day of May of each year, known as Memorial Day."

An opinion is requested whether veterans who are employed by the day at a daily rate of pay are entitled to pay for Memorial Day, Saturday, May 30, which is normally not a working day.

Since the question is posed, the provision obviously does not clearly express the intent of the city council. We must look beyond the language employed to ascertain the purpose of the provision. Memorial Day is a day

which, in the expressed view of the city council, is of special significance to veterans. We believe it was the consensus of the city council to grant them the opportunity of observing that day without *loss* of pay. The reason for special consideration of veterans in observing Memorial Day on Saturday does not exist, and to pay them their daily rate for that day would be *extra pay* with no reason to discriminate between veterans and other persons employed by the day. Such discrimination would be unjust and of doubtful validity.

Our opinion is that the city council did not intend to authorize *extra pay* to veterans for a Saturday Memorial Day.

WAGE ASSIGNMENT

(No. 12314—City Comptroller—S. R. D.—January 13, 1960.)

We acknowledge receipt of your letter of January 12, 1960 transmitting a certified copy of an order of the Circuit Court of Cook County, Illinois, in the case of *Charlotte E. Saunders v. Vincent E. Saunders*, No. 49 C 1406, together with an Assignment of Wages pursuant to Section 21.1 of Chapter 40 of the Illinois Revised Statutes wherein and whereby Vincent E. Saunders, Jr. assigns \$150.00 each month of his wages due from the City of Chicago to Charlotte DeRois Saunders. Subsequently, you delivered in person certified copies of an order and assignment of wages in the case of *Odessa Boone v. George Boone*, No. 58 S 167, by which George Boone, pursuant to order of court, assigns to Odessa Boone \$200.00 each month of his wages due from the City of Chicago.

Your letter states the following:

"We, therefore, request a legal opinion:

1. Under Section 21.1 of Chapter 40 of the Illinois Revised Statutes does the said Wage Assignment hold the City liable?
2. Should we deduct the specified amounts each payroll period and forward them to the Plaintiff—in this case the Plaintiff lives in Caracas, Venezuela."

Section 21 of the Divorce act (Ill. Rev. Stat. 1959, chap. 40, par. 21.1) enacted at the 1959 term of the legislature, provides in substance as follows:

"To secure compliance with any order * * * for child support provided for in this act, the Court may * * * require the party ordered to pay such support to execute an assignment of * * * his wages.

"The assignment shall be filed with the Clerk of the Court, and shall be valid against * * * employers * * * served with a certified copy of the Order by which the assignment was required * * *.

* * * * *

"The Court, upon ten days' notice in writing, served upon the employer * * *, may enter judgment and direct the issuance of an execution thereon against any employer * * *."

It shall be noted that the statute is general in terms and provides that the Wage Assignment shall be enforceable "against current and subsequent employers". The Act does not specifically state that the Wage Assignment "shall be valid" against a municipality.

In this regard, Section 21 of the Divorce Act is similar to the Attorney's Lien Act (Ill. Rev. Stat. 1959, chap. 13, par. 14). This Act provides in substance as follows:

"Attorneys at law shall have a lien * * * for the amount of any fee * * *. To enforce such lien, such attorneys shall serve notice in writing * * * upon the party against whom their clients may have * * * suits * * *, claiming such lien * * * and such lien shall attach to * * * any money * * * which may be recovered * * * from and after the time of service of the notice. On petition filed * * * any court shall * * * adjudicate the rights of the parties and enforce such lien in term time or vacation."

Likewise, the Garnishment Act is enforceable against "any person * * * indebted to the judgment debtor" (Ill. Rev. Stat. 1959, chap. 62, par. 33).

The courts have consistently held that there is a clear cut prohibition against embroiling a municipality in private litigation in which it has no direct interest, even though its employees might be involved. In the very recent case of *Sherwin & Sherwin v. City of Chicago* (1959), 21 Ill. App. 2d 124 (Abst.), the trial court entered a judgment against the City of Chicago in the sum of \$885.50 in full settlement of an attorneys' lien filed by Sherwin & Sherwin in the judgment rendered in favor of Annie K. Marks in the sum of \$2500.00 against the City of Chicago. On appeal, the Appellate Court reversed the judgment, saying:

"We are sympathetic with an attempt to collect attorneys' fees for work done. However, we believe that the public policy, that a municipal corporation cannot be made an instrument or agency for the collection of private debts, is controlling in this case, and therefore the order appealed from should be reversed, even though execution or garnishment process is not sought to enforce it."

In the light of the foregoing, we are of the opinion that wage assignments issued pursuant to Section 21 of the Divorce Act are unenforceable against the City of Chicago.

We are returning the certified copies of the orders and wage assignments in the *Saunders* and *Boone* cases.

LIMIT ON PROMOTION SALARY INCREASE

(No. 12348—President, Civil Service Commission—R. L. C.—July 13, 1960.)

We are in receipt of your inter-office communication of July 6, 1960 wherein you request an interpretation of Section C-7 of the Classification and Compensation Plan for City Employees adopted by the City Council on December 23, 1959.

The fact situation you present is,

"a case wherein an employee received a two-step increment on January 1, 1960, because of the fact that the class grade of his particular position was raised. Now his department is advancing him to a higher level supervisory position and wishes to give him an additional one-step increment because of said promotion to a higher position".

So that this opinion would not deal with the abstract, I solicited and received from your office the specifics of the particular case at hand which are as follows:

"The position in question is License Investigator, Class Grade 8. The subject employee's 1959 salary rate was \$4,380 and was increased two steps to \$4,824 in 1960. The Department now contemplates a promotion to Supervising License Investigator, Class Grade 9 and an increment to the employee to \$5,064."

The language of Section C-7,

"Salary adjustments for employees by means of advancement within a salary range, promotion, reclassification of position, or change of class grade of position shall be made as set forth herein, provided that no employee shall receive more than a two-step increase or salary adjustment in any calendar year, unless an adjustment to the entrance rate of a higher level position exceeds the two-step limitation".

is explicit and unambiguous, and when read in conjunction with Section C-3 obviously contemplates an *adjustment to the entrance rate following a promotion* regardless of any other consideration, or, in the terms of the ordinance, "even though this may provide an increase in excess of two steps".

If the salary to which the department sought to advance the subject employee was *the listed entrance rate* for the class grade assigned the higher position such increase would be appropriate; this, however is not the case. Here the subject employee with a Grade 8 classification is currently earning *more than the listed entrance rate* for Grade 9. The promotional salary contemplated is an "intermediate rate" applicable to the class as distinguished from the "entrance rate". This fact immediately takes the case out of the express exemption in Section C-7. The subject employee has already received the "two step increase" limit provided for in Section C-7 and thus the further increase contemplated by the promotion is prohibited thereby.

CHAPTER III—ANNUITIES AND BENEFITS FOR CITY EMPLOYEES

A. MUNICIPAL EMPLOYEES' ANNUITY AND BENEFIT FUND

EMPLOYEE PAID BY FEDERAL FUNDS

(No. 11844—*Municipal Employees' Annuity and Benefit Fund*—G. F. M.—August 26, 1954.)

In response to your request for an Opinion concerning Mrs. Caroline Prendergast, a member of your Fund, the following is submitted:

Your letter states, and the records show, that Mrs. Caroline Prendergast began work as a temporary employee of the City of Chicago on July 17, 1934, as a hospital nurse; that on July 22, 1935 she became a Field Nurse, which position she was still occupying at the end of her temporary service on November 30, 1949; that from April 10, 1942 to December 31, 1945, she continued to work as a Field Nurse under the direction of the Municipal Tuberculosis Sanitarium of the City of Chicago; that, during that period of time, she was paid from Civilian Defense funds; that the Civilian Defense fund was made up of Federal contributions to the City of Chicago in order that the regular staff of Field Nurses of the Municipal Tuberculosis Sanitarium might be maintained; that these funds were paid through the City Comptroller and City Treasurer to the employees who received payment of such Civilian Defense funds; and that your question is: Whether or not Mrs. Caroline Prendergast is entitled to contribute to your Fund for that period of service during which her work for the Municipal Tuberculosis Sanitarium was paid for through Civilian Defense funds.

During the period of time that Mrs. Caroline Prendergast was paid by Civilian Defense funds, she was a temporary employee of the City of Chicago and, as such, was not at that time eligible for membership in your Fund. Had she been a member of your Fund, she would have been protected by the provisions of the Act governing your Fund. Inasmuch as your Act has been amended so as to permit temporary employees meeting certain requirements to become members of your Fund, it appears to be only fair that those provisions that would have protected members of your Fund during the period of time that they receive funds from Civilian Defense should be considered as having been in effect for her.

In addition to this above consideration, it was not a question of Mrs. Caroline Prendergast doing other work for the City in a temporary capacity, or of having been assigned to perform work for or by some outside agency. The records indicate that she continued to work in the position to which she had been appointed in the City's service and that her work remained unchanged; that she was under the supervision and control of the Municipal Tuberculosis Sanitarium (who had the right to hire her or discharge her), and that the only thing that was changed in connection with her work was the source of the money that she received as salary for her services.

We are, therefore, of the opinion that Mrs. Caroline Prendergast is entitled to contribute to your Fund for that period of temporary service from April 10, 1942 to December 31, 1945, as though she had been paid by City funds.

VOUCHER PAID EMPLOYEE

*(No. 11911—Municipal Employees' Annuity and Benefit Fund—
G. F. M.—June 14, 1955.)*

In response to your request for an Opinion concerning Mr. Detler E. Mackelmann, the following is submitted:

Your letter states that Dettler E. Mackelmann is Deputy Housing and Redevelopment Coordinator for the City of Chicago; that his name is not carried on the payroll, but that he is paid by voucher; that the voucher is drawn against an appropriation made by the City Council which appears on Page 179, Account No. 436-S-11 "For Expense in Coordinating the Housing, Slum Clearance, and Redevelopment Program", all in the 1955 Appropriation Ordinance; and that Mr. Mackelmann has applied for membership in your Fund.

Mr. Mackelmann is under the supervision and control of the City Council, City of Chicago and, although he is paid by voucher from the appropriation above set out, the moneys contained in such appropriation were obtained from the sale of some "Slum Clearance Bonds, 1945" and, consequently, are City funds.

It is our opinion that Mr. Mackelmann, is being paid by moneys belonging to the City of Chicago and that, inasmuch as he is under the supervision of the City Council, he is an employee of the City of Chicago and is entitled to become a member of your Fund upon his meeting the requirements set out in the Act governing your Fund for membership.

CIVIL DEFENSE EMPLOYEES

*(No. 11947—Municipal Employees' Annuity and Benefit Fund—
G. F. M.—September 1, 1955.)*

In response to your request for an Opinion as to whether or not the employees of the Chicago Civil Defense Corps are eligible for participation in your Fund, the following is submitted:

The Civil Defense Corps of the city of Chicago was created pursuant to an Act of the Legislature of the State of Illinois (Ill. Rev. Stats. 1953, Ch. 127, Sec. 269). After the passage of said Act, the City Council of the city of Chicago passed an ordinance creating a local Civil Defense Organization, under the direction and control of the Mayor and subject to the Illinois Civil Defense Act of 1951 (above cited).

The Illinois Civil Defense Act provides, in part thereof, for a tax to be levied by the City Council of any city establishing a local Civil Defense Corps. It also provides for an appropriation to be adopted by the controlling body of any city so that expenses incident to the maintaining of the local defense corps may be met. In the city of Chicago these appropriations carry the identifying number "800" and appropriate \$35,000.00 for the payment of salaries of employees of such local defense corps. Such employees are under the control of the city of Chicago and are subject to the rulings of its officials; they are also paid by the city of Chicago for the service they render.

Section 12 of the Act governing your Fund (Ill. Rev. Stats. 1953, Ch. 24, Sec. 1055) provides, in part thereof, as follows:

"The following words and terms as used in this Act shall mean as follows, respectively: 'Municipal Employees': Any person who was, is, or shall be employed by such city or the board of education of such city * * * as an employee, provided said person or other person shall, before being included as a municipal employee, meet the following qualifications: (1) Have rendered service not less than twelve (12) calendar months to such city or board of education of such city as an employee, officer or official, four of which said calendar months of service must have been consecutive full normal working months of service rendered immediately prior to filing application to be included; and (2) file written application, while in the service, with the Retirement Board created by this Act to be included under the provisions of this Act; * * * and provided further, that this definition shall not include and this Act shall not apply to any person employed in a position the duties of which will not ordinarily permit of service during a calendar year for four months in any case wherein the salary or wage is on a monthly basis or for seventeen weeks in any case wherein the salary or wage is on a weekly basis, or for one hundred days in any case wherein the salary or wage is on a daily basis, or for seven hundred hours in any case wherein the salary or wage is on an hourly basis; * * * nor to any person who shall have attained an age of sixty-five (65) or more years when he shall enter the service or who shall not have qualified as a participant and become a contributor prior to such age; nor to any employee of such city or board of education or Retirement Board who shall be a participant (by virtue of his being or having been an employee member) in any annuity and benefit fund, any annuity and retirement fund or any pension fund now or hereafter in operation in such city for the benefit of employees of such city or board of education of such city, except the Annuity and Benefit Fund herein provided for or a municipal pension fund defined hereinafter in this section."

Any employee of the local Civil Defense Corps who has the qualifications hereinabove set out would, therefore, be entitled to become a member of your Fund upon filing the application so required.

It is our opinion that the employees of the local Civil Defense Corps are entitled to become members of your Fund provided they meet the qualifications set out for membership in Section 12 of the Act governing your Fund.

ELIGIBILITY OF CONSULTING PHYSICIAN

(No. 11993—General Superintendent, M. T. S.—G. F. M.—December 29, 1955.)

In response to your request for advice in connection with Dr. Clement Martin, the following is submitted:

Your letter states that Dr. Clement Martin is a Consulting Physician at the Municipal Tuberculosis Sanitarium; that as such Consulting Physician he makes approximately forty-eight visits per year to the sanitarium in order that he might perform his duties there, for which he is paid the sum of \$25.00 for each such visit; and that Dr. Martin has informed you that he would like to become a member of the Municipal Employees' Annuity and Benefit Fund of Chicago, if it is possible for him so to do.

The Act governing the Municipal Employees' Annuity and Benefit Fund of Chicago (Ill. Rev. Stat. 1955, Ch. 24, Sec. 1055) provides in part thereof as follows:

"'Municipal Employee': * * * and provided further this Act shall not apply to any person employed in a position the duties of which will not ordinarily permit of service during a calendar year for four months in any case wherein the salary or wage is on a monthly basis, or for seventeen (17) weeks in any case wherein the salary or wage is on a weekly basis, or for one hundred (100) days in any case wherein the salary or wage is on a daily basis."

Because Dr. Clement Martin is paid by the day (i. e., for each visit he makes) and because Dr. Martin does not render service to the Municipal Tuberculosis Sanitarium for a period of time in excess of 100 days, he does not come within the definition of a municipal employee hereinabove set out.

We are, therefore, of the opinion that Dr. Clement Martin does not render a sufficient amount of service to the City so that he may qualify for membership in the Municipal Employees' Annuity and Benefit Fund of Chicago.

WIDOW'S ANNUITY

(No. 12201—Municipal Employees' Annuity and Benefit Fund—G. F. M.—February 7, 1958.)

In response to your request for an opinion concerning the widow of William S. Smith, Sr., the following is submitted.

Your request states that William S. Smith, Sr. became an elective participant of your Fund February 1, 1957, and made payment for annuity purposes for prior service dating back to August 19, 1955; that in May, 1957 he became disabled; that he was granted ordinary disability benefit for such disability; and that his credit for such benefit expired July 21, 1957. At the time of the expiration of his credit he was still disabled and unable to return to work; that he died, at the age of 56, on December 4, 1957, leaving him surviving a widow and adult children; that, having been a temporary employee, there was, of course, no formal leave of absence covering the period of time between which he was on disability benefit and the date of his death; that at the time of the death of Mr. Smith he had less than ten years of service; and that upon the expiration of his credit he did not apply for the annuity which becomes payable to him under that section of the act allowing him to receive annuity when his credit for ordinary disability benefit expired. Your question is whether or not Mr. Smith's widow is entitled to receive a widow's annuity or whether a refund is payable to the adult children of Mr. Smith.

Section 49 of the act governing your Fund (Ill. Rev. Stats. 1957, Chap. 24, Sec. 1092) provides in part thereof, as follows:

"Notwithstanding any other provision of this Act, whenever any municipal employee who shall have served less than twenty (20) years and who shall have received Ordinary Disability Benefit under the provisions of this Act, shall be disabled, as the result of any cause other than injury incurred in the performance of an act or acts of duty, for a period or periods of time aggregating in excess of one-fourth (1/4th) of the entire period of such service rendered by such municipal employee, exclusive of any period of disability during which such municipal employee shall have received Ordinary Disability Benefit under the provisions of this Act * * * and such municipal employee shall resign or be discharged from service while still so disabled and before he shall have attained an age of sixty (60) years, such municipal employee shall have the right to receive annuity from and after the date of such resignation or discharge from the service of such amount as can be provided from the sum to the credit of such municipal em-

ployee on the date of such resignation or discharge for the purpose of providing annuity for such municipal employee. Any such annuity shall be computed as of the age of the municipal employee concerned on the date of his resignation or discharge from the service. The annuity to which the wife of any such municipal employee shall have a right from and after the date of the death of such municipal employee shall be fixed on the date of the resignation or discharge of such municipal employee. It shall be of such amount as can be provided from the amount to the credit of such municipal employee on the date of his resignation or discharge from the service for the purpose of providing annuity for the widow of such municipal employee * * *

It is to be noted from the above quoted section of the Act governing your Fund that upon Mr. Smith's separation from the service there was an annuity fixed for the widow of Mr. Smith.

The fact that Mr. Smith did not apply for his own annuity under the above quoted section does not prohibit his widow from receiving the annuity which was fixed for her.

We are, therefore, of the opinion that the widow of William S. Smith, Sr. is entitled to receive the annuity which was fixed for her on the date of the separation from the service of her husband, under the provisions of the above quoted section of the Act.

RECIPROCAL ACT

(No. 12295—Municipal Employees' Annuity and Benefit Fund—G. F. M.—September 3, 1959.)

In response to your request for an opinion in connection with the granting of an annuity, in connection with the Reciprocal Act, the following is submitted:

Your letter states that an employee resigned from the service of the City of Chicago on January 1, 1956; that he entered the service of Cook County on the same date; that on July 1, 1959, at age 65, he retired from the County employees' service and applied for an annuity from both your Fund and the County Employees' Annuity and Benefit Fund.

On January 1, 1956, the employee in question had twenty years of service in the City and his average salary for the last five years of his service was \$5,520.00; his average annual salary for the three and a half years of service in the County's employ was \$12,000.00. Your question is: Can the annuity now payable from your Fund be computed on the basis of the 1957 Amendatory Act by giving consideration to the actual salary (without the limitations set up by the Act in the years 1953 and 1957) earned during part of the last five years of service while in the County, in computing the last five years salary average—or—is the annuity payable from the Municipal Employees' Fund to be based on the salary provisions and on the law as it existed on the date such employee's service with the City was terminated, i.e., January 1, 1956?

Both your Fund and the County Employees' Annuity and Benefit Fund have adopted the provisions of an Act entitled "An Act to Establish Continuity and Preservation of Pension Credit for Employees of Governmental Service in the State of Illinois" and commonly known as the "Retirement Systems Reciprocal Act". Section 3 of that Act (Ill. Rev. Stats. 1957, Chap. 127, Sec. 246.3) provides in part thereof as follows:

"Any employee who has withdrawn or withdraws from the service of one employer and then or later enters the service of another em-

ployer covered by the provisions of this Act and who has not forfeited his pension credit in the retirement system maintained by the employer from whose service he has withdrawn, shall be entitled to a proportional retirement annuity * * * computed as stated herein for the periods of credited service in each retirement system * * *

Section 5 of the same Act (Section 246.5), provides:

"Upon retirement, in the retirement system to which the employee last made contributions, a proportional retirement and annuity shall be computed by each retirement system in which pension credit has been established by the employee on the basis of salary and service credits under each system. Such computation shall be in accord with the formula or method prescribed by each system and in effect at the date of the employee's latest withdrawal from the service of the employer maintaining such retirement system * * *

In addition to the fact that the annuity is payable under the terms and conditions that existed under your Act at the time the employee left the City service, there is also the provision of the Constitution of 1870 of the State of Illinois, to be found under Article IV, Section 19, which provides in part, as follows:

"The General Assembly shall never grant or authorize extra compensation fee or allowance to any public officer, agent, servant, or contractor, after service has been rendered, or a contract made, nor authorize payment of any claim, or any part thereof thereafter created against the State under any agreement or contract made without express authority law * * *

Under the provisions of your Act, under the provisions of the Retirement System Reciprocal Act, and under the Constitution of the State of Illinois (1870), such employee is not entitled to have his annuity based on any Amendatory Act to your Fund passed after the date of his separation from the service which entitled him to be a member of your Fund.

We are therefore of the opinion that the annuity to be payable from your Fund is to be computed upon the employees average salary for the last five years of service in the City of Chicago while a member of your Fund, and upon no other basis.

B. FIREMEN'S ANNUITY AND BENEFIT FUND

REFUND OF UNUSED PENSION MONEY

(No. 11858—Firemen's Annuity and Benefit Fund—G. F. M.—September 29, 1954.)

In response to your request for an Opinion as to the manner in which a refund should be paid to the heirs of Carl Meyer, the following is submitted:

Your letter states and your records show that Carl Meyer entered the service of the Chicago Fire Department on January 15, 1913; that he died July 14, 1953, holding the rank of Captain and assigned to Marine Engine Company No. 58; that, at the time of his death Carl Meyer left him surviving a widow, Beatrice Meyer, who had been his second wife, and two children, Richard K. Meyer and Harold E. Meyer, who had been born to him and his first wife; that Beatrice Meyer applied for and was granted a widow's annuity in the amount of \$114.78 per month beginning July 15, 1953 and terminating on her death on August 29, 1954; that, at the

time of the death of Beatrice Meyer, she was survived by two children, Eileen and James, who had been born to her and her first husband and that, at the time of the death of Beatrice Meyer, there was remaining in the accumulation standing to the credit of Carl Meyer the sum of \$2,756.28, from an original balance at the time of his death of \$4,303.96. Your question is: To whom should this refund of \$2,756.28 be paid?

Section 39 of the Act governing your Fund (Illinois Revised Stats. 1953, Chapter 24, Section 944.39) provides in part thereof as follows:

"(e.) In any case in which an amount equal to the total amount accumulated to the account of a deceased unmarried fireman from sums deducted * * * from the salary of such fireman for annuity purposes shall not have been paid to such fireman * * * and in the case of a deceased married fireman, to such fireman and the widow of such fireman, both together, in form of an annuity before the death of the last of such persons who shall die, an amount equal to the difference between such total amount resulting from sums deducted from his salary and the entire amount paid in form of annuity or annuities, without interest upon either such amount, shall be refunded and paid to the administrator or executor of the estate of such deceased fireman; and if there be no administrator or executor as aforesaid, then the money so to be refunded may be applied toward the payment of the burial expenses of such deceased fireman, and any balance remaining after the payment of such burial expenses shall be paid to the heirs of such fireman according to the Law pertaining to the estates of deceased persons * * *."

In the case of *In re: Estate of Redmond Weldon*, deceased, the Appellate Court of the First District of Illinois held that the balance of an accumulation refunded under the provision of an identical Statute should be paid to the widow's heirs in the same proportion that the widow would take in relation to the other heirs of the deceased fireman under the law of descent of the State of Illinois.

In accord with that holding of the Court, had Mrs. Meyer not received any annuity, but had taken her rightful share under the law of descent of the State of Illinois, she would have received, in accord with the Statute having to do with Administration of Estates (Chapter 3, Illinois Revised Stats. 53, Section 162) one-third of the personal estate. The accumulation standing to the credit of Mr. Meyer at the time of his death was \$4,303.96. Of this \$4,303.96 Mrs. Beatrice Meyer received the sum of \$1,547.68, leaving a balance of \$2,756.28. Mrs. Meyer, during her lifetime received roughly 15/43rds of the accumulation left by Mr. Meyer, or more than one-third of this sum, which amount is larger than the one-third to which she would have been entitled had the accumulation been distributed to Mr. Meyer's heirs at the date of his death.

We are of the opinion that, Mrs. Meyer having received during her lifetime the amount hereinabove set forth, there remains nothing whatsoever in your Fund which can be distributed to her heirs under the provisions of your law and the holding in the Weldon case, and that the moneys now remaining in your Fund standing to the account of Carl Meyer should be distributed proportionately to his children.

DEDUCTIONS FROM PENSION CHECKS

(No. 11860—*Firemen's Annuity and Benefit Fund*—G. F. M.—October 15, 1954.)

In response to your request for an Opinion concerning possible payments by your Fund for pensioners or annuitants, out of annuities or pensions payable by your Fund, the following is submitted:

Your letter states that various pensioners and annuitants of your Fund have requested that deductions be made from their monthly annuity and pension checks in order that your office might use those deductions to pay the monthly premiums or charges for membership in the Blue Cross Plan for those pensioners and annuitants; that if it were possible to have your Board pay in a lump sum monthly, the Blue Cross premiums for such pensioners and annuitants of your Fund, the rate that they would be required to pay for Blue Cross coverage would be less in a group than as individuals.

Section 59 of the Act governing your Fund (Illinois Revised Stats. 1953, Section 944.59) provides in part thereof as follows:

"All pensions, annuities, refunds and disability benefits granted under the provisions of this Act, and every portion of such pensions, annuities, refunds and disability benefits shall be exempt from attachment or garnishment process, and shall not be seized, taken, subjected **to, detained or levied upon** by virtue of any execution or any process or proceeding whatsoever issued out of or by any Court in this State, for the payment and satisfaction, in whole or in part, of any debt, damage, claim, demand or judgment against any pensioner, annuitant, applicant for refund, or other beneficiary hereunder, and no such pensioner, annuitant, applicant for a refund or other beneficiary shall have any right to transfer or assign his or her pension, annuity, refund or disability benefit, or any part thereof, either by way of mortgage or otherwise * * *".

The above quoted Section was included in your Act in order that your Board would be saved from trouble and harassment by creditors of firemen and in order that any pensioners, annuitants, applicants for refund or any other beneficiaries would not have taken away, through their own act or the action of others, the moneys which would be payable to them either by reason of their services or, if a widow, by reason of her husband's service. To permit, at this time, the payment of moneys from your Fund to the Blue Cross Plan for insurance, while it appears to be to the advantage of the firemen who might wish to avail themselves of such plan, is highly dangerous in that it tends to open the door which this particular Section closes tightly.

To make monthly payments to the Blue Cross for insurance might well be the precedent for a flood of requests by various firemen in regard to payment of bills, installment notes, Union dues, Blue Shield, White Cross, or any other insurance policy which they may own and be payable monthly, semi-monthly, bi-monthly, quarterly, semi-annually or yearly. These payments, in addition to violating the intent of the Act, might soon require the full-time services of an employee who would be serving not your Fund, but the recipients of annuities or pensions.

We are, therefore, of the opinion that, under the Act which governs your Fund, it is not possible for your Fund to permit pensioners or annuitants to pay for hospital care by having deductions made from their pension checks and paid in a lump sum to the Corporation which handles the Blue Cross Plan.

FUTURE ENTRANT

(No. 11923—Firemen's Annuity and Benefit Fund—G. F. M.—July 7, 1955.)

In response to your request for an Opinion concerning one Lawrence J. Benner, the following is submitted:

Your letter states and your records show that Lawrence J. Benner was born on May 9, 1904; that he entered the Fire service on February 21, 1931 as an assistant telegraph repairer; that he was discharged from his position

as a probationary assistant telegraph repairer on April 11, 1931; that Mr. Benner was reinstated on June 22, 1934, his discharge having been cancelled; that on August 24, 1937, together with other telegraph repairers and assistants, he again became a member of your Fund by transfer from the Municipal Employees' Annuity and Benefit Fund of Chicago, in accordance with a Corporation Counsel Opinion dated June 8, 1937; and that you are requesting that I clarify his position in the service in this Opinion.

Section 12 of the Act governing your Fund (Ill. Rev. Stats. 1953, Ch. 24, Section 944.12) provides in part thereof as follows:

"Present employee: Any fireman as hereinbefore described who shall be in the employment of such city as a fireman thereof on the day before the date on which this Act shall come in force and effect in such city * * *."

Section 36 of the Act governing your Fund (Ill. Rev. Stats. 1953, Ch. 24, Section 944.36), provides in part thereof as follows:

"A fireman who shall not be in the fire service of such city on the day before the date upon which this Act comes into force and effect in such city and who was in such fire service prior to that said date and who shall re-enter the service after that said date and before attainment of an age of fifty-seven (57) years, shall not have any right to be credited with any sum or sums for prior service annuity purposes on account of any service rendered prior to the date upon which this Act shall come in force and effect in such city, and such fireman shall not have any right to prior service annuity, and the wife or widow of such fireman shall not have any rights to widow's prior service annuity. However, the period of service rendered by any such fireman prior to the date upon which this Act shall come in force and effect in such city shall be included in computing the term of service of such fireman for age and service annuity and widow's annuity purposes. * * *"

The above quoted sections of the Act have to do with firemen who entered the service prior to the date of this Act and are separated from the service prior to June 30, 1931, and then re-enter the Fund at a later date.

As may be readily ascertained from the definition of "present employee", Mr. Benner cannot be classified as a "present employee", as he was not in the employment of this city as a fireman on the day before the date upon which this Act came into force and effect in this city, i.e., June 30, 1931.

Under the provisions of Section 36 of this Act, hereinabove set out, Mr. Benner has a right to be a member of this Fund and is entitled to have credit for the period of time he served prior to his separation from the service on August 11, 1930.

The classification of "future entrant" is defined as follows (Ill. Rev. Stats. 1953, Ch. 24, Section 944.12):

"Future Entrant: Any fireman (as hereinbefore described) who shall be employed as a fireman of such city for the first time on or after the date upon which this Act shall come in force and effect in such city, but before June 30, 1953."

Mr. Benner originally entered the service on February 21, 1931, and was discharged on April 11, 1931. He then re-entered the service of the city on June 22, 1934.

The definition of "future entrant" as it is written does not, in a strict interpretation, include individuals in the position of Mr. Benner, in that he actually entered the service of the city prior to the effective date of the Act governing your Fund. However, Mr. Benner is not permitted to benefit from his service prior to June 30, 1931, except to have his period of service stand as a time credit and not a time-and-contribution credit.

In order that Mr. Benner shall have a status to which a name may be attached, it is necessary that his entrance into the service on June 22, 1934 be considered as though it was his original entrance into the service and he be considered a "future entrant" with, however, a time credit for his short period of service prior to the effective date of the Act governing your Fund.

We are, therefore, of the opinion that Mr. Benner's status in your Fund is that of a "future entrant" and he is entitled to the rights and privileges of a future entrant member of your Fund.

AWARD AMOUNT

(No. 11946—Policemen's and Firemen's Death Benefit Fund—A. F. G.—September 1, 1955.)

On September 1, 1955, we received from Alderman Cullerton, Chairman Committee on Finance, the following letter:

"The Board of Trustees of the Policemen's and Firemen's Death Benefit Fund have on file the matter of the death of Fire Lieutenant Berneal Deady who, according to the record on hand, died a duty death on July 22, 1955, and the matter of the death of Patrolman William Murphy who died a duty death on August 15, 1955.

Your attention is directed to the passage of S. B. No. 50 approved by Governor Stratton on June 14, 1955, which Bill provides for an increase in the awards that may be made by the Board of Trustees. Your attention is also directed to the fact that on July 26, 1955, C. J. page 870-871, the City Council passed and defeated a motion to reconsider an ordinance providing for increase in awards in accordance with the terms of S. B. No. 50.

The Board of Trustees requests your opinion as to the effective date on which awards may be made in accordance with the terms of S. B. No. 50 and the ordinance passed on July 26, 1955 by the City Council."

Senate Bill No. 50 referred to in the letter amends Section 1 of an Act authorizing cities and villages, by general ordinance, to provide for the payment of allowances of money to the families or dependents of policemen or firemen killed or fatally injured while in the performance of their duties. The bill increased the amount payable under this Act from \$10,000 to \$15,000. This bill passed June 3rd, was approved June 14th, and became effective July 1, 1955.

On July 26, 1955 (C. J. pp. 870-871), the City Council passed an ordinance providing for increases in awards in accordance with the terms of Senate Bill No. 50. This ordinance was signed by the Mayor September 1, 1955, and is now in effect.

When your board meets on September 7, 1955, to make awards in the cases filed as authorized by Chapter 22 of the Municipal Code of Chicago, you should make the awards in conformity with amended Section 22-12 of that chapter, which will then be in full force and effect, regardless of the date of death of the persons whose cases are considered. The law in effect at the time the award is made is controlling and not the law in effect at the time the death occurred.

The ordinance here under consideration directs your body in making awards after its effective date to do so in accordance with its terms.

COMPUTING WIDOW'S ANNUITY

(No. 11977—Firemen's Annuity and Benefit Fund—G. F. M.—November 1, 1955.)

In response to your request for an Opinion as to the interpretation of Senate Bill No. 51 as it may affect widows of firemen now on pension or annuity, the following is submitted:

In an earlier request you had asked for an interpretation of this Section in regard to the widow of a fireman who was still a member of the Fire Department but who had attained age fifty-seven prior to July 1, 1955. That Opinion held that such widow would be entitled to receive from your Fund the amount provided for her by the accumulation standing to her credit in her widow's annuity account, but not to exceed Two Hundred (\$200.00) Dollars a month.

A fireman who has terminated his service in the Fire Department and is now retired upon a pension has severed all connections with the city and with your Fund and is entitled to receive for himself an annuity based upon the law as it was at the time of his retirement. Because his widow receives her right through her husband, and because his service has terminated and his pension cannot be changed, such widow is entitled to receive from your Fund only such amount of pension as was fixed for her at the time of her husband's separation from the service.

The Constitution of 1870 of the State of Illinois, in Article IV, Section 19, provides in part thereof as follows:

"The General Assembly shall never grant or authorize extra compensation, fee or allowance to any public officer, agent, servant or contractor after service has been rendered * * *".

The Supreme Court of Illinois, in the cases of *Porter v. Lochr* (332 Illinois 353) and *Wagner v. The Retirement Board* (370 Illinois 73) held that once service had been terminated, no increase in pension could be granted.

Inasmuch as the widow of a policeman or of a fireman receives her annuity or pension by reason of his service for the City of Chicago, when the husband of a potential widow leaves the service, her annuity is fixed on the date on which he leaves the service and under the law as it is on such date. The one element necessary to permit the widow to receive any possible benefit from the change made by Senate Bill No. 51 is missing. That element is active employment of the potential widow's husband in the service of the City of Chicago as a fireman.

We are, therefore, of the opinion that potential widows of men who have retired from the Fire Department are entitled to receive annuities, upon the death of their fireman husbands, in the amounts that were fixed for such potential widows at the time of the retirement of their husbands from the service.

SERVICE AFTER RETIREMENT AGE

(No. 12109—Firemen's Annuity and Benefit Fund—G. F. M.—February 21, 1957.)

In response to your request for an opinion as to whether or not Mr. Anthony J. Mullaney is entitled to receive credit for services performed after attainment of age 63, the following is submitted.

Your records show and your letter states that Mr. Mullaney was separated from the fire service as Chief Fire Marshal on February 7, 1951 at the age of 63; that he was then made Assistant Fire Commissioner; that on March 16, 1955 he became Fire Commissioner; that he resigned from that position on February 1, 1957; and that you request an opinion as to whether Mr. Mullaney is entitled to receive credit for annuity purposes for his service from February 7, 1951 to March 16, 1955.

The Act governing your Fund (Ill. Rev. Stat. 1955, Chap. 24, Section 944.1 et seq.) contains no restriction as to age, except in Section 61 (944.61). That section, however, provides in part thereof, as follows:

"* * * No increase in any pension annuity or other benefit hereunder shall accrue to any such fireman by virtue of any service performed by him subsequent to reaching any compulsory retirement age provided by law or ordinance."

These particular words were added to the Act governing your fund on July 15, 1955, about four months after Mr. Mullaney had earned credit for services performed as Assistant Fire Commissioner. It is a well-known rule of law that legislation is progressive in nature and unless specifically provided, not retrospective. To provide that Mr. Mullaney was not entitled to the credit he had already earned at the time of the above amendment would be to give a retrospective effect to such legislation. It is not within the belief of this assistant that any retrospective action was intended by the legislature.

To deny Mr. Mullaney the credit he had already received at the time legislation was passed would be to give that legislation *ex post facto* effect, which would be contrary to Article I, Section 6 of the Constitution of the United States, and Article II, Section 14 of the Constitution of Illinois.

We are, therefore, of the opinion that Mr. Mullaney, having earned the credit for the period from February 7, 1951 to March 16, 1955, prior to the adoption by the legislature of the amendment preventing the earning of such credit, is entitled to have his annuity based on all of his service prior to March 17, 1955. If, during any period of his service, deductions have not been made from his salary it is necessary that he make contribution to your fund of the amount that such deductions would now be worth.

WIDOW AND CHILDREN'S AWARD LIMITATION

(No. 12164 — *Firemen's Annuity and Benefit Fund of Chicago* —
G. F. M.—September 26, 1957.)

In response to your request for an opinion as to the amount of money which may be paid to the widow and children of George L. Donovan, deceased, a former fireman, the following is submitted.

Your letter states that George L. Donovan, age 41, was Captain of Engine Company 29 of the Chicago Fire Department; that he was killed on March 1, 1957 while fighting a fire at 527 West 41st Street; that he left him surviving, his widow, Louise C. Donovan, and four minor children; that at the regular meeting of your Board, held on March 20, 1957, the widow of George L. Donovan was granted an annuity in accordance with the provisions of the Act as amended in 1955; that the Board granted to each of the four minor children the sum of Twenty Dollars (\$20.00) per month; that one of the children attained age 18 on the 30th day of March, 1957 and in accordance with the Act, his grant of child's annuity was terminated on that date, and that you request

an opinion as to whether or not child's annuity is to remain at its present rate, or is to be limited by reason of some of the provisions contained in Section 44 of your Act.

In the year 1955, Section 33 of the Act governing your Fund (Ill. Rev. Stats. 1955, Chap. 24, Section 944.33), was amended to give to a widow whose husband died as the result of the performance of an act of duty, compensation annuity in the amount of Twenty-Four Hundred Dollars (\$2,400.00) a year, or Two Hundred Dollars (\$200.00) a month. At the same time and in the same Senate Bill, the amount of child's annuity payable under the Act governing your Fund was increased from Ten Dollars (\$10.00) to Twenty Dollars (\$20.00) a month (Ill. Rev. Stats. 1955, Chap. 24, Section 944.44). While these benefits of the widow and the children were increased, the limitation formerly fixed in the Act was not changed. That limitation was contained in Sec. 44 of your Act (Ill. Rev. Stats. 1955, Chap. 24, Section 944.44) and provides, in part, as follows:

"Provided, if annuities for the widow and children of any fireman who shall die on or after the date on which this Act shall come in force and effect in said city, and whose death shall have been the result of the performance of any act or acts of duty performed on or after said date, or for the children of such fireman in any case wherein a widow shall not exist, computed at the rate hereinbefore stated, would exceed an amount equal to the final salary of not more than Three Thousand Dollars (\$3,000.00), of such fireman the annuity for each child of such fireman shall be reduced pro-rata so that the combined annuities for the family of such fireman shall not exceed such amount;"

It is noted in the above quoted section that the limitation expressly put upon the amount that the widow and children of a fireman who died as the result of the performance of an act or acts of duty shall not exceed "an amount equal to the final salary of not more than Three Thousand Dollars (\$3,000.00) of such fireman". This limitation was placed on the amount the widow might receive at the time of the original passage of this Act when the salary of a fireman was Twenty-Five Hundred Dollars (\$2,500.00) a year. At the present time, the salary of a fireman (first-class) is Fifty-Two Hundred Twenty Dollars (\$5,220.00).

As the legislature originally fixed the total sum of payments to the family of a fireman whose death was the result of the performance of an act or acts of duty at an amount not to exceed his salary, and since that time the grant to the widow of such fireman was increased sixty per cent (60%) from Fifteen Hundred Dollars (\$1,500.00) a year to Twenty-four Hundred Dollars (\$2,400.00) and the child's annuity was doubled from One Hundred Twenty Dollars (\$120.00) a year to Two Hundred Forty Dollars (\$240.00), and the salary of a fireman was increased from Twenty-Five Hundred Dollars (\$2,500.00) a year to Fifty-two Hundred Twenty Dollars (\$5,220.00), it must now be considered that the limitation in dollar amount must be eliminated and the present limitation in the Act shall be equivalent to the salary paid a First-Class Fireman at the present time. Therefore, only the words "would not exceed an amount equal to the final salary of such fireman" should be read in fixing the limit on the amount that may be received by a widow such as is described above.

We are, therefore, of the opinion that the amount of widow's annuity, together with the child's annuity, presently being paid to Louise C. Donovan should remain in the amounts already granted by your Board inasmuch as the total amount now being received by Mrs. Donovan is less than amount equal to the final salary of such fireman.

FIRE COMMISSIONER

(No. 12250—*Firemen's Annuity and Benefit Fund*—G. F. M.—September 5, 1958.)

In response to your request for an opinion concerning the status of Robert J. Quinn, Fire Commissioner in your Fund, the following is submitted.

Your letter states that Robert J. Quinn was born May 12, 1905; that he entered the Fire Department of the City of Chicago; that he was promoted by reason of examinations and appointments on various dates through all the ranks and grades of the Fire Department to that of Division Marshal; that on July 20, 1955 he received a temporary appointment as Second Deputy Fire Marshal; that on April 20, 1956 he received a temporary appointment as Assistant Fire Commissioner; that on March 20, 1957 he was appointed Fire Commissioner.

Your letter further states that no deductions have been made from the salary of Robert J. Quinn since April 30, 1956 and you have requested an opinion as to the status of the Commissioner with respect to deductions from his salary into your Fund.

Section 12 of the Act governing your Fund (Ill. Rev. Stats. 1957, Chap. 24, Section 944.12) provides in part thereof as follows:

"The following words and terms as used in this Act shall mean as follows, respectively:

"'Fireman': Any person who was, is, or shall be in the fire service thereof as a fireman, fire engineer, Marine engineer, or fire pilot, and whose duty is to participate in the work of controlling or extinguishing fire at the location of any such fire whether such person shall be assigned to duty within such fire service other than the actual extinguishing of fire or not."

The Rules and Regulations, Practices and Procedures of the Chicago Fire Department provide (pages 6 and 7) in part thereof, as follows:

"There is established by law an executive department of the municipal government of the City of Chicago known as the Fire Department. This department includes the Bureau of Fire Control and extinguishment * * *

"The Fire Commissioner shall exercise sole and exclusive control and management of the Fire Department, and of its personnel * * *

The exercise of control of the department by the Fire Commissioner certainly means that the Commissioner participates in extinguishing fires, although not personally present at the location of such fire and, therefore, is still an active member of your Fund.

Section 61 of the Act governing your Fund (Ill. Rev. Stats. 1957, Chap. 24, Section 944.6) provides in part thereof as follows:

"No annuity, pension or other benefit shall be paid to any fireman, or to the widow of any fireman, under or pursuant to any of the preceding provisions of this Act, general or special, excepting Section 52, based upon any salary paid to such fireman by virtue of a temporary appointment. All contributions, annuities, and benefits shall be related to the salary which shall attach to the permanent position of each fire-

man concerned. Any fireman temporarily serving in a position or rank other than that to which he has received permanent appointment shall be treated for all purposes of this Act while so serving as though he were serving in his permanent position or rank."

Mr. Quinn was appointed to the position of Commissioner of the Fire Department from his permanent position of rank of Division Fire Marshal.

We are, therefore, of the opinion that Mr. Quinn is still a member of your Fund and as such should have deductions made from his salary as Commissioner, based upon the salary attached to the rank of Division Marshal which was his last permanent position in the rank and grade of the department.

ED. NOTE: See Opinion No. 12354 p. 172.

MILITARY SERVICE CREDIT

(No. 12253—Firemen's Annuity and Benefit Fund—G. F. M.—October 13, 1958.)

In response to your request for an opinion concerning Richard D. O'Connor the following is submitted.

Your letter states that Richard D. O'Connor was born September 7, 1908; that he entered the Chicago Fire Department May 26, 1936; that on November 30, 1942 he was granted a military leave of absence, entering the military service on the same day; he was discharged from the military service on June 12, 1946; and resigned from the Fire Department of the City of Chicago on July 1, 1946. Richard D. O'Connor has made an application for annuity and we would appreciate an opinion as to whether or not the period of military service and the contributions made during that time in lieu of salary deductions is applicable for purposes of annuity in this case.

The General Assembly of the State of Illinois in the year 1941 passed an Act permitting Municipal Corporations to preserve Civil Service and Pension rights of their employees inducted into or enlisting in the land or naval forces of the United States (Ill. Rev. Stats. 1957, Ch. 24½, Section 150, et seq.).

On November 6, 1940 and again on September 23, 1943, the City Council of the City of Chicago adopted resolutions preserving the Civil Service and Pension rights of Civil Service employees of the City of Chicago. Under the aforementioned resolutions of the City Council and the Statutes of the State of Illinois, Richard D. O'Connor is entitled to credit for annuity purposes for the period of time he spent in military service, i.e., from November 30, 1942 to June 12, 1946.

It makes no difference whether or not Richard D. O'Connor returned to the fire service after his separation from military service, as a return to the fire service is not necessary in order to receive credit for his military service.

We are therefore of the opinion that Richard D. O'Connor is entitled to receive credit for annuity purposes not only for his period of service in the fire department but also for the period of service that he rendered while in the Armed Forces of the United States.

REFUND OF WIDOW'S ANNUITY DEDUCTIONS

(No. 12260—*Firemen's Annuity and Benefit Fund*—G. F. M.—December 5, 1958.)

In response to your request for an opinion concerning Anthony J. Hoyne, the following is submitted:

Your letter states that Anthony J. Hoyne was born June 13, 1898; that he married Marie Zynda August 29, 1926; that he entered the fire service on August 11, 1927; that his wife, Marie, died March 7, 1956; that he resigned from the department on November 1, 1958; and that you have requested an opinion as to whether or not he is entitled to receive a refund of the monies deducted from his salary and paid into your fund for widow's annuity purposes as he was single at the time he resigned.

Section 39 of the Act governing your Fund (Ill. Rev. Stats. 1957 Chap. 24 Section 944.39(5)(b)), provides in part thereof, as follows:

"5(b) When any firemen shall become 57 years of age, while in the service, and shall not then be married, any sum accumulated from deductions from his salary for widow's annuity purposes shall then be refunded to him. Thereafter, in his case, no sums shall be deducted from his salary or contributed by the City for widow's annuity purposes."

As Mr. Hoyne's wife was alive on June 13, 1955, he was not a single man on his 57th birthday and therefore is not entitled to receive a refund of deductions made from his salary for widow's annuity purposes.

The Act governing your fund, however, was amended in 1957 in the sections having to do with contributions for widow's annuities so as to permit the continued contribution for widow's annuity purposes while men are in the service (Ill. Rev. Stats. 1957, Chap. 24, Sections 944.21 and 944.22). While Mr. Hoyne is not entitled to receive a refund of all the accumulation standing to his credit for widow's annuity, there should be refunded to him the deductions made from his salary for widow's annuity purposes, after his attainment of age 57, because any deductions taken from him after his wife's death, on March 7, 1956 (which deductions started September 1, 1957), were of no use to him, for his wife was dead, and had he married after her death, the deductions would not have increased the annuity payable his widow as she would only be entitled to the minimum annuity provided in Section 57 of the Act governing your fund (Ill. Rev. Stats. 1957, Chap. 24, Section 944.57).

We are therefore of the opinion that Mr. Hoyne is entitled to a refund of only that part of the accumulation for his widow's annuity that was deducted from his salary since September 1, 1957.

REFUND DEDUCTION EXCLUDED FROM ANNUITY

(No. 12289—*Firemen's Annuity and Benefit Fund*—G. F. M.—July 6, 1959.)

In response to your request for an opinion concerning Timothy J. Love, the following is submitted.

Your letter states that Timothy J. Love was born January 21, 1900; that he entered the service of the Fire Department on July 8, 1941, and resigned as of November 20, 1958; that he made application to your Fund for his annuity

which was granted at the regular meeting of this Board on May 21, 1959, in the amount of \$70.67 per month beginning on November 20, 1958, and to continue for his life time; and that Mr. Love's annuity is based on an accumulation resulting from deductions from his salary until such time as he attained age 57. You request a Corporation Counsel opinion as to whether deductions received by your Fund from Mr. Love's salary after attainment of such age are refundable to him.

Inasmuch as Mr. Love retired in the year 1958 and at that time, while he was 58 years and 11 months old, he had but 17 years, 4 months and 12 days of service in the department. Mr. Love's annuity was therefor based on his attainment of age 57, as is provided by the actuarial computation provisions of the Fund.

After attainment of age 57 Mr. Love continued, while he was in the service, to have deductions made from his salary and paid into your Fund. These deductions so made from Mr. Love's salary and paid into your Fund cannot be used for the purpose of increasing Mr. Love's annuity nor may they be retained by the Firemen's Annuity and Benefit Fund of Chicago as your Fund has no right to retain deductions from a man's salary unless such deductions are to be repaid to him in the form of annuity, or to his widow as widow's annuity.

The Act governing your Fund has no expressed provision for the return of monies to a fireman or the widow of a fireman in excess of that necessary to provide the annuity payable to them. The intention of the legislature as to the return of such funds, is contained in the Act governing the Laborer's and Retirement Board Employees' Annuity and Benefit Fund of Chicago, in Section 37 thereof (Ill. Rev. Stats. 1957, Ch. 24, Section 1144 (3d par.)), as follows:

"If at any time the amount of annuity for the wife of any employee shall be fixed in accordance with the foregoing provisions of this Act, there shall be to the credit of such employee, for the purpose of providing annuity for such wife, when she shall become a widow, an amount in excess of that necessary to provide for her an annuity equal to the maximum annuity hereinbefore allowed her in this section, all deductions from salary or payments otherwise made by such employees for annuity purposes, for services rendered from and after the date the accumulated sums to the credit of employee for annuity purposes would first have provided the wife of such employee with such an amount of annuity, shall, with interest at the effective rate, be refunded to such employee;
* * *

Section 37 of the Act governing the Municipal Employees' Annuity and Benefit Fund of Chicago (Ill. Rev. Stats. 1957, Ch. 24, Section 1080), provides in part thereof as follows:

"If at the time the amount of annuity for the wife of any Municipal employee shall be fixed, in accordance with the foregoing provisions of this Act, there shall be to the credit of such Municipal employee for the purpose of providing annuity for such wife, when she shall become a widow, an amount in excess of that necessary to provide her for an annuity equal to the maximum annuity hereinbefore allowed her in this section, all deductions from salary or payments otherwise made by such employee for annuity purposes, for services rendered from and after the date the accumulated sums to the credit of the employee for annuity purposes would first have provided for the wife of such employee with such amount of annuity, shall with interest at the effective rate, be refunded to such employee * * *

These two sections above quoted show the intention of the legislature, that no monies shall be deducted from the salary of an employee which is not used to his or his wife's benefit, shall be refunded to the employee concerned.

Just as any deductions made from a man's salary and not used by him in the receipt of his annuity must be refunded to whomsoever is alive at the

time that such fireman shall die, the deductions made from Mr Love's salary after January 21, 1957, the date of his 57th birthday, should be refunded to him.

We are therefore of the opinion that deductions made from the salary of Timothy J. Love after his attainment of age 57, which deductions cannot be used for annuity purposes, should be refunded to him.

CONTRIBUTION RATE FOR COMMISSIONER

(No. 12354—Firemen's Annuity and Benefit Fund—G. F. M.—September 9, 1960.)

In response to your request for an opinion concerning the status of Robert J. Quinn, Fire Commissioner of the City of Chicago, with respect to his contributions into your fund, the following is submitted.

Your letter concerning the aforementioned Robert J. Quinn states that you requested and received an opinion of the Corporation Counsel; that that opinion stated deductions from his salary should be based on the salary attached to his rank of Division Marshal; and that this opinion was received and concurred in at the regular meeting of your board on September 17, 1958.

Your records indicate that Robert J. Quinn was appointed to the office of Fire Commissioner by the Honorable Richard J. Daley, Mayor of the City of Chicago; that after such appointment, the City Council concurred in and approved the appointment of Robert J. Quinn to the position of Fire Commissioner of the City of Chicago (Journal of the Proceedings of the City Council, March 14, 1957, Page 4482); that since the information contained in your file indicates that Mr. Quinn's position might be of a permanent nature, you have requested this opinion as to whether or not the deductions made from the salary of Robert J. Quinn and paid into your fund should not be based upon the full salary of Robert J. Quinn as Commissioner.

Section 61 of the Act governing your fund (Illinois Revised Statutes, 1959, Chapter 24, Section 944.61) provides in part thereof as follows:

"No annuity, pension or other benefits shall be paid to any fireman, or to the widow of any fireman, under or pursuant to any of the preceding conditions of the act, general or special, excepting Section 52, based upon any salary paid to such fireman by virtue of a temporary appointment. All contributions, annuities and benefits shall be related to the salary which shall attach to the permanent position of each fireman concerned. Any fireman temporarily serving in a position or rank other than that to which he had received permanent appointment shall be treated for all purposes of this Act while so serving as though he was serving in his permanent position or rank."

The above section of the Law was written into the Act governing your fund in order to prevent the elevating of men into a top position in the Fire Service, so that they might retire at the higher rate of pay and thus receive a higher pension than would be attached to the regular position which they held in the Fire Department. Robert J. Quinn, however, has not been appointed to a higher position in the service for the purposes of retiring him at a higher rate of annuity, but so that he might have complete control and authority over the entire department. At the time of his appointment, he was not appointed on a temporary basis, which appointment would be renewed every sixty days, at the discretion of the person appointing him, but he was appointed by Richard J. Daley, Mayor of the City of Chicago, and his appointment was confirmed by the City Council.

This appointment and confirmation would take Mr. Quinn's present position out of the class of temporary appointments and would place him in a permanent position from which he can be removed only by resignation or by the City Council. It therefore follows that Robert J. Quinn is occupying a permanent position in the Fire Department in the City of Chicago and deduction for purposes of Annuity should be taken from the salary attached to his position as Commissioner.

We are therefore of the opinion that Robert J. Quinn's status is a permanent one and consequently any deductions made from his salary for Annuity purposes should be based upon the salary attached to his position as Fire Commissioner.

C. POLICEMEN'S ANNUITY AND BENEFIT FUND

ILLEGITIMACY AS BAR TO CHILD'S ANNUITY

(No. 11782—*Policemen's Annuity and Benefit Fund*—G. F. M.—January 18, 1954.)

In response to your request for an opinion as to whether or not children's annuity may be paid to the M..... children, the following is submitted:

Your records show that F..... S. M....., a member of the Police Department of the City of Chicago, and T..... A. H..... were married in Montgomery County, Pa., on March 19, 1932; that F..... M..... was divorced from T..... M..... in Chicago, Illinois, February 7, 1949, being Case No. 48 S 8780; that F..... M..... and a woman known as B..... M..... became the parents of F..... M....., born September 20, 1948, and M..... M....., born February 12, 1951; that at the time F..... M..... was born, F..... M..... and his wife, T..... M....., were still married, as a decree was not entered in Divorce Proceedings until February 7, 1949.

The records also show that the woman, known as B..... M..... was never married to F..... M..... but, in reality was one B..... U....., who was divorced by her husband, J..... U....., on April 25, 1952, Case No. 52 C 2438.

F..... M..... and M..... M....., both of whom were born at the Swedish Covenant Hospital on the date afore mentioned were both born out of wedlock and were never adopted by F..... M....., nor were they legitimized by marriage of their parents. In your records there appears a certified copy of Appointment of one Mrs. S..... O..... as guardian of the children. She is a sister of B..... U..... also known as Mrs. F..... M.....

Your question is as to whether or not a children's annuity may be paid to F..... and M..... M....., as the children of F..... M.....

Section 43 of the Act governing your Fund (Ill. Rev. Stats. 1953, Chap. 24, Section 988) provides in part thereof as follows:

"Child's annuity as hereinafter provided, shall be granted and paid for the benefit of any unmarried child less than eighteen (18) years of age either the issue of any following described policeman who shall die on or after the first day of the month of January of the first year after

the year in which this Act shall come in force and effect in such city, or one who shall have been legally adopted by such policeman, at least one year before the death of such policeman * * *

In the case of *Pearl Wittbrodt v. Woodland et al.*, 295 Ill. App. 431, 15 N. E. 2d 318, the Appellate Court of Illinois said (page 322) :

"* * * It is inconceivable that the legislature intended by the language employed in the Act to include therein any natural child of a policeman, since deceased, which said child was born out of wedlock and not subsequently legitimized by marriage or adoption and who could after the policeman's death come forward and prove its own illegitimacy and secure public revenue to be paid for its support and maintenance. Such an interpretation of the language of the Act is not justified and it would be destructive of the sanctity and security of the marriage relationship."

In *Marsh v. Field*, 297 Ill. 251, 130 N. E. 753, which was a case involving the meaning of the word "issue" in the Will of Marshall Field, where it was sought to secure a portion of the estate for an illegitimate child. The Supreme Court held that the word "issue" means lawful issue and said (page 755) :

It is not conceivable that a man of intelligence and moral perception should have had the conscious intention of providing for the illegitimate issue, not only of his sons and grandsons but his daughters and granddaughters."

Based on the above holdings of both the Supreme Court of Illinois and Appellate Court of Illinois, we are of the opinion that no payment may be made Mrs. S..... O....., as guardian of F..... P. and M..... S. M.....

It then follows that your Board is faced with the serious problem of disposing of the accumulations in your Fund standing to the credit of F..... S. M..... Your records disclose that F..... S. M..... was one of a fairly large family and is survived by several brothers and sisters who, under the law, are entitled to a refund of the accumulation standing to the credit of F..... S. M.....

It is respectfully suggested, however, that there would be no impropriety in your office attempting to secure waivers and direction from those legally entitled to the refund, to pay it to the lawful guardian of the children of F..... S. M..... in order that those children who possibly may go through the rest of their lives with the stigma of illegitimacy upon them, receive some benefit from those responsible for their being.

RESIGNATION DURING MENTAL INCOMPETENCY

(No. 11797—*Policemen's Annuity and Benefit Fund—G. F. M.—March 23, 1954.*)

In response to your request for an opinion concerning Arthur J. Anderson, the following is submitted :

Your letter states that Arthur J. Anderson, a member of the Police Department of the City of Chicago, was on leave of absence for the latter portion of last year; that he had suffered from a heart attack and as a result thereof, was mentally affected; that Mr. Anderson's son, in order to obtain money with which to care for his father, took steps that resulted in the resignation of Patrolman Anderson on October 1, 1953; that on November nineteenth, your office had the investigator for your Fund deliver an application for annuity to Mr. Anderson which application was signed by Mr. Anderson in the presence of said investigator.

Your letter further states that Mr. Anderson recovered from his disability and mental incompetency and on January 8, 1954, again applied for his annuity. He has not, in the interim, received any moneys whatsoever from your Fund, from the date of his resignation to the present time.

Your records show that the Doctor who was taking care of Mr. Anderson during his illness has stated in letters to the Board that Mr. Anderson's illness was such that he was incapable of protecting his own rights and that he did not regain his mental stability until the end of the year.

Your records also show that the annuity payable to Mr. Anderson by reason of his resignation on October 17th, if such resignation be accepted as valid, is in the amount of \$105.53 a month; that the amount of annuity that would be payable if his resignation were effective as of January 8th, at or about the time of his recovery of mental stability, would be \$181.00 a month by reason of the provisions of Section 16½ of the Act governing your Fund.

Your records further show that the date of resignation of Mr. Anderson has been discussed by your office with the Civil Service Commission authorities of the City of Chicago, and a request was made to such authorities that a change be made in the date of resignation from October 1, 1953, to January 1, 1954; that the Secretary of the Civil Service Commission informed the party requesting such change that it could not be made, that the Civil Service Commission has adopted rules and regulations which forbade any change in dates of resignation, even though such resignations were made by mistake, or by incompetent persons, or for any other reasons; and that the party making such inquiry of the Secretary was also informed by him that due to these regulations, to make such change it would be necessary that Court action be taken so that a Court order be secured directing such change be made.

From all the material in your file, it appears that the resignation of Mr. Anderson on October 1st, was an act of desperation resulting from the action of his son.

It also appears from the written statements of Dr. L. J. Baranov attending Mr. Anderson, that Mr. Anderson was out of his mind at the time he signed his resignation. Such a statement by the Doctor to the proper authorities at that time, would have been sufficient to commit such person to an institution and would have resulted in any action of his being invalid.

We are of the opinion that Mr. Anderson's resignation on October 1, 1953, should be considered void because of his mental condition. His resignation should be considered to have been made at the time of his recovery from his mental instability. As Mr. Anderson had recovered his mental status sufficiently to make a new application for annuity on January 8, 1954, it is our opinion that his resignation should also become effective on such date.

We are, therefore, of the opinion that for the purposes of the Act governing your Fund, Arthur J. Anderson's resignation from the Police Department, which was signed October 1, 1953, should be considered to be effective as of January 8, 1954, the date of his application for annuity, and his annuity should be based on such date of resignation as of January 8, 1954.

ANNUITANT AS FUND EMPLOYEE

(No. 11807—Policemen's Annuity and Benefit Fund—G. F. M.—April 26, 1954.)

In response to your request for an opinion concerning a policeman employee of your office the following is submitted:

Your letter questions whether or not a retired Chicago Policeman who is receiving an annuity can become an employee for your office and continue

to receive such annuity. The Act governing the Policemen's Annuity and Benefit Fund, in Section 34 thereof (Ill. Rev. Stats. 53, Chap. 24, Section 978), states:

"B. When any such policeman shall reenter the service after he shall have attained an age of fifty-seven (57) or more years, payments on account of any annuity previously granted to such policeman shall be suspended during the time hereafter that he shall be in the service."

Paragraph A of the same section contains the same provision but deals with policemen under the age of 57 years.

The word "service" as set out in the last line of the above quoted section can only mean "police service" as a policeman's annuity is based solely upon his service as a policeman and not upon service in any other capacity. The Policemen's Annuity and Benefit Fund is not a part of the Police Department. It is a separate and distinct organization created by a special Act of the legislature, and has only to do with the granting of annuities and disability benefits to policemen, their widows, and their children.

The employees of the Policemen's Annuity and Benefit Fund are not permitted to become members of that Fund. They may voluntarily become members of another (The Laborers' and Retirement Board Employees' Annuity and Benefit Fund of Chicago). It can readily be determined that while the Policemen's Annuity and Benefit Fund of Chicago renders certain services to the individual policemen members of the Police Department, or retired from the Police Department, or to widows or children of deceased policemen, it does not, nor does its employees, perform police duties. The word "service" as used in the Act governing your Fund can only mean police service.

In the case of *Kelly v. The Firemen's Annuity and Benefit Fund of Chicago*, Kelly, a Fireman had attained the age of 55 years, retired, and received a pension of \$120 a month. Kelly became a school engineer-custodian, and received a salary from the Board of Education of \$315 a month. The Fire Fund upon learning of Kelly re-entering the service of the City of Chicago stopped his pension, and Kelly, by means of certiorari, sought to recover his monthly annuity.

The Appellate Court of Illinois in determining this case (292 Ill. App. 390, 11 N. E. 2nd 220), said at Page 233:

"The provision in this statute relating to the suspension of pensions appears to us to be clear and unambiguous, and it therefore requires no construction. It provides that, when an applicant becomes a pensioner and re-enters the fire service, the board has power to suspend payment of his pension, during the time he was re-employed 'in the service' and this clearly refers only to 'service' in the fire department."

From the interpretation that the Court has placed upon the words "in the service" it follows that a policeman is entitled to receive his annuity during a period of employment in any service of the City of Chicago except the Police service.

We are, therefore, of the opinion that if your Fund employs a retired policeman who is in receipt of an annuity from your Fund, he may continue to receive his annuity while at the same time, he is an employee of your Fund.

RATE OF INTEREST PAID UPON REFUND

(No. 11875—*Policemen's Annuity and Benefit Fund*—G. F. M.—December 10, 1954.)

In response to your request for an opinion concerning refund payable to Thomas F. Trahey, the following is submitted :

Your letter states and your records disclose that Patrolman Thomas F. Trahey, a member of the Police Department, resigned on May 4, 1954, to take a position in the Civil Service of the City of Chicago as a plumber; that on September 23, 1954, Thomas F. Trahey applied for a refund and, at the meeting of your Board on October 21, 1954, a refund of \$2,713.49 was ordered to be paid to Thomas F. Trahey, which refund included interest at the rate of 1½% per annum; that on November 15, 1954, a request was made by Thomas F. Trahey that there be added to his refund, interest in the full amount of four percent (4%) instead of the interest that was paid him at the rate of 1½%, which difference in interest amounts to \$549.63.

Your question concerns the rate of interest to be paid to Thomas F. Trahey upon his refund :

Section 39 of the Act governing your Fund (Ill. Rev. Stats. 1953, Ch. 24, Section 983) provides in part thereof as follows :

"1. Any future or present employee, without regard to the period of time he shall have served, who shall have resigned or be discharged from the service as of the first day of the month of January of the first year after the year in which this Act shall become in force and effect in such city, and before he shall become fifty (50) years of age * * * shall have a right to have refunded to him the entire amount which shall have been deducted from his salary for age and service annuity and widow's annuity purposes on the date of such resignation or discharge from the service, together with interest at 1½% per annum on every deduction from the date of such deduction."

The above quoted Section is the Section which has to do with repayment to policemen who leave the service, of moneys which they have paid into any fund. This Section also provides for the return of interest to be paid on moneys at the time of discharge.

It is unfortunate that a man who is working for the same general over-all organization and leaves one specific portion of the service of this general over-all organization to work in another specific portion of the service, suffers a loss by reason of such transfer, but the law makes no provision to take care of those members who hope to better themselves by changing from one part of the City service to another.

It is, therefore, our opinion that the original amount of interest included in the refund paid to Thomas F. Trahey on October 21, 1954, was at the proper rate.

CLAIM FOR INTEREST UPON REFUND

(No. 11876—*Policemen's Annuity and Benefit Fund*—G. F. M.—December 10, 1954.)

In response to your request for an opinion concerning Clarence D. Rood, the following is submitted :

Your letter states and your records disclose that Clarence D. Rood was born June 3, 1904; that he became a member of the Police Department on

October 16, 1951; that, prior to his appointment in the Police Department, he had been employed by the City of Chicago in the Bureau of Sanitation as a motor truck driver from July 26, 1948 to October 15, 1951; that during that period he had contributed to the Municipal Employees' Annuity and Benefit Fund; that on June 16, 1952 he transferred the accumulation he had in the Municipal Employees' Annuity and Benefit Fund, in the amount of \$710.66, to your Fund; and that he died on November 10, 1954.

Your question is as to whether or not any interest upon the amount of money transferred from the Municipal Employees' Annuity and Benefit Fund to this Fund should be paid upon the refunding of such money to the widow of Clarence D. Rood.

Section 41½ of the Act governing your Fund (Ill. Rev. Stats. 1953, Ch. 24, Section 985-a) provides in part thereof as follows:

"Any contributor to and participant in this Fund (other than a member of the Fire Department of such city) who has served or shall hereafter have served as a member of the Police Department of such city for a period of ten (10) or more years and who, prior to becoming such member was in the employ of such city and was a contributor to and participant in any pension fund or any other annuity and benefit fund existing in such city by operation of law, shall have a right to pay into the Annuity and Benefit Fund herein provided for, an amount equal to the sum which would have accumulated to the credit of such policemen in this Fund from deductions from his salary for annuity purposes on the date when such payment shall have been made into this Fund if such policeman had been paying into the annuity and benefit fund herein provided for such sums as he actually paid into such pension fund or into such other annuity and benefit fund * * *."

Inasmuch as the provisions of this Section control the payment by a member of contributions which accumulated to his credit in another Fund and, as this Section sets up as a prerequisite for such payment, a contribution to this Fund for a period of ten (10) or more years, it must be held that any payments paid into this Fund prior to the giving of service for the aforesaid ten years is but a pre-payment, does not attach to or become a part of a policeman's contributions for pension purposes, nor does it bear interest, as far as a refund is concerned, until after a period of service wherein the contributor thereof has served in the Police Department for ten or more years.

We are, therefore, of the opinion that, in making a refund to the widow of the moneys paid by the aforesaid Clarence D. Rood, there can be paid to her only the principal sum of Seven Hundred Ten and 66/100 (\$710.66) Dollars which her husband paid into the Fund on June 16, 1952.

CREDIT FOR PARK DISTRICT SERVICE

(No. 11958—Policemen's Annuity and Benefit Fund—G. F. M.—September 19, 1955.)

In response to your request for an Opinion concerning Albert W. Glenn, the following is submitted:

Your letter states and your records show that Mr. Glenn was born December 1, 1910; that he became a member of the Chicago Park Police Department on December 3, 1936; that he was a member of the Armed Forces from June 3, 1943 to October 22, 1945; that, after termination of his Military Service, he re-entered the service of the Park Police Department and served until November 27, 1945; that on November 27, 1945 he became a member of the

Police Department of the City of Chicago; that he was promoted to the rank of Sergeant of Police on April 16, 1954; and that Sgt. Glenn wishes to secure credit for his period of service as a park policeman from December 3, 1936 to June 31, 1943 and from October 22, 1945 to November 27, 1945, by paying into your Fund the deductions and interest covering his actual service in the Department. Your letter further states that because the Fund will not transfer credits covering his period of Military Service, which were paid for by the Park District under the provisions of Sections 150 to 153, both inclusive, Chapter 24½, Ill. Rev. Stats. He has requested that such credits be waived and you request an opinion as to whether or not such credits may be waived. You also request an opinion as to whether or not he should be required to pay for ordinary disability benefits and administration expenses during his period of actual service with the Park Police.

Section 41½ of the Act governing your Fund was amended at the last session of the Legislature to permit the transfer of credits, not only from employees of the city of Chicago, members of the Municipal Employees' Annuity and Benefit Fund of Chicago, but also, among others, members of the Park Policemen's Annuity and Benefit Fund. This Section reads in part thereof as follows (Ill. Rev. Stats. 1953, Ch. 24, Section 985-a) :

"Any contributor to and participant in this Fund (other than members of the Fire Department of such city) who has served or shall hereafter have served as a member of the Police Department of such city for a period of ten or more years and who, prior to becoming such member was in the employ of such city, Park District of such city * * * and was a contributor to and participant in any pension fund or any annuity and benefit fund existing in such city by operation of law shall have the right to pay into the annuity and benefit fund herein provided for an amount equal to the sum which would have accumulated to the credit of such policeman in this fund from deductions from his salary for annuity purposes on the date when such payment shall have been made into this fund if such policeman had been paying into the annuity and benefit fund herein provided for such sums as he actually paid into such pension fund or such other annuity and benefit fund * * *."

Section 985-a (above quoted) was added to the Act creating the Policemen's Annuity and Benefit Fund in the year 1937. Four years later, in the year 1941, an Act was passed entitled: "An Act authorizing municipal corporations to preserve civil service and pension rights of their employees inducted into or enlisting in the land or naval forces of the United States, or ordered to active duty in the military or naval forces of the State" (approved March 26, 1941).

The above-cited Act was passed by the Illinois Legislature because of the Selective Service Act passed by the Government, which went into effect in 1940. The Legislature felt that those public employees, members of annuity and benefit funds, who participate in the Armed Services, should not thereby suffer a loss in building up an annuity as a public employee and for that reason permitted municipalities wherein annuity and benefit funds existed, to pay into such annuity and benefit funds, on behalf of employees in the military service, such amounts of money as the employee would have had deducted from his salary had he remained in the service of such municipal corporation instead of having been in the military service.

As a result of the above-cited Act, many employees have had credited to them for service the period of time they spent in military service. They have also had contributions made by the city on their behalf for the same period of time.

At the time Section 985-a came into force and effect, there had been no way that any cash credits could be accumulated in an annuity and benefit fund by a member thereof, except such credits as might result from deductions from his own salary.

Sergeant Glenn received certain credits for a period of Military Service by reason of contribution by the Park District into the Park Policemen's Fund on his behalf, and these credits then became a part of the credits to which Sergeant Glenn was entitled. It must be considered that the intention of the Legislature, in permitting a man to transfer credits that he had in one fund into another fund, was that he transfer all of such credits and not only a part of such credits, as otherwise it might be possible for a man to transfer and pay for only so much of his credits in one fund as might be necessary to secure him a full annuity from another fund. In this manner an annuity and benefit fund might be deprived of money that it would be entitled to receive in order that all persons would contribute during their entire period of service and not for just that period of his service as is necessary to secure for them a pension.

To permit a man to contribute for only a sufficient number of years to entitle him to receive an annuity (which, in your fund, is twenty-five years) would work a hardship upon the fund and is unfair to policemen having terms of service longer than twenty-five years, who were required to pay during the entire term of their service.

We are of the opinion that it was the intent of the Legislature that when credits are transferred, the entire amount of credits which a person has accumulated should be transferred. If the amount of refund payable to him by the Fund from which he is transferring is insufficient to pay for the credits to be transferred, the individual must make up the deficiency out of his own funds.

We are also of the opinion that Sergeant Glenn, under the wording of Section 41½ (1985-a) of your Act, can pay only for annuity purposes and, therefore, is not allowed to pay for ordinary disability benefits or administration expenses.

REINSTATEMENT AFTER ILLEGAL DISCHARGE

(No. 11994—Policemen's Annuity and Benefit Fund—G. F. M.—December 30, 1955.)

In response to your request for an opinion concerning Leon I. Sweitzer, the following is submitted:

Your letter states and your records show that Leon I. Sweitzer was discharged from the Police Department on January 25th, 1929; that he filed a suit for reinstatement, alleging that his discharge was illegal; that on March 29, 1934 he requested and received a refund of the salary deduction accumulations that had been made by him; that on July 14, 1934 the Honorable Joseph B. David, Judge of the Superior Court of Cook County directed that he be restored to active duty; that at the time of entry of the order of restoration Mr. Sweitzer waived his right to receive salary for the period of time he was illegally separated from the Police Department, and that Mr. Sweitzer has requested permission of your Fund to repay the refund he received in 1934, and also to repay the salary deductions during the period he was illegally separated from the service.

Your question is as to whether or not Mr. Sweitzer may be permitted to repay the refund he received and the salary deductions that should have been taken from his salary while he was illegally separated from the service.

On July 14, 1934 Mr. Leon I. Sweitzer was restored to active duty by the Honorable Joseph B. David, and that action wiped out his discharge, which had occurred on January 25, 1929, as an "illegal" discharge is not a discharge.

At the time Mr. Sweitzer waived his salary, he or his attorney should have realized that the deductions should be made from the salary he waived and paid into your Fund at the rate prescribed by the Act governing the Policemen's Annuity and Benefit Fund. When Mr. Sweitzer failed to have such deductions made from the salary he waived, he became personally responsible for such deductions and, at this time he not only may pay such deductions into your Fund, but he is required to pay such deductions, together with interest at the rate of 4% from the date of such deductions would have been made to the date such deduction is paid by him. The refund that Mr. Sweitzer received became, upon his restoration to the service, a refund illegally made or secured.

We are, therefore, of the opinion that Mr. Sweitzer not only may make repayment of the refund he received, but he is required to make such repayment and, in addition thereto, he is required to pay the deductions which should have been taken from the salary payable to him (which salary he waived) for the time he was illegally discharged. Interest must also be paid on both of these items, so that your Fund suffers no monetary loss.

SERVICE CREDIT WHILE AN ASSISTANT STATE'S ATTORNEY

(No. 12009—*Policemen's Annuity and Benefit Fund—G. F. M.—February 3, 1956.*)

In response to your request for an Opinion concerning Sergeant John L. Henrick, the following is submitted:

Your letter states and your records show that John L. Henrick was born March 23, 1907; that he was appointed to the Police Department on December 7, 1935; that on August 1, 1943 he was granted a leave of absence to accept an appointment as an Assistant State's Attorney for Cook County; and that on October 1, 1955, he returned to active service in the Police Department and, on the same date, was promoted to the rank of Sergeant of Police.

Your question is as to whether or not Sergeant Henrick may pay into the Policemen's Annuity and Benefit Fund for the period from August 1, 1943 to October 1, 1955, and receive therefor a credit for his service as a county employee.

Section 41½ of the Act governing your Fund (Ill. Rev. Stat. 1955, Ch. 24, Sec. 985a) provides in part thereof as follows:

"Any contributor to and participant in this Fund (other than a member of the Fire Department of such city) who has served or shall hereafter have served as a member of the Police Department of such city for a period of ten or more years and who, prior to becoming such member was in the employ of such city, park district of such city, sanitary district and county within whose boundaries such city shall lie, or the Board of Education whose boundaries shall be co-terminus with such city, and was a contributor to or participant in any pension fund or in any other annuity and benefit fund existing in such city by operation of law, shall have the right to pay into the annuity and benefit fund herein provided for an amount equal to the sum which would have accumulated to the credit of such policeman in this fund from deductions from his salary for annuity purposes on the date when such payment shall have been made into this fund if such policeman had been paying into the annuity and benefit fund herein provided for such sums as he actually paid into such pension fund or into such other annuity and benefit fund."

It is to be noted that this credit for other service is to be allowed to a policeman only in the event he had rendered such service to the divisions of Government set out above prior to his becoming a police officer, been a participant of a pension fund for such division of Government, and had ten years of service as a policeman.

Inasmuch as Sergeant Henrick's service was not prior to his becoming a policeman, we are of the opinion that he cannot pay into your Fund for the service he rendered as an Assistant State's Attorney.

WIDOW'S ANNUITY — PROOF OF MARRIAGE

(No. 12017—*Policemen's Annuity and Benefit Fund*—G. F. M.—February 29, 1956.)

In response to your request for an Opinion concerning one Pauline E. Noonan, the following is submitted:

Your letter states and your records show that Walter E. Noonan was a member of the Police Department of the City of Chicago; that on February 7, 1924 he married one Pauline Holofchak; that Walter E. Noonan died on January 7, 1956.

A check of the records indicates that Pauline Holofchak was married to one Edward Kasandar on January 16, 1917, prior to her marriage to Walter E. Noonan; that, after she had lived with Edward Kasandar about two months he left her and, since that date, she has had no information concerning him; that, prior to Edward Kasandar's leaving her, he told her that his marriage to her was illegal and, therefore, no marriage existed.

You request an Opinion as to whether or not the marriage of Pauline Holofchak to Walter E. Noonan on February 7, 1924, was a marriage such as would leave her his widow, for the purposes of your Fund.

The Supreme Court of the State of Illinois has always looked very carefully into any attempt to cast doubts upon the marriage of two people. It has held, since its creation to the present time, that when a marriage has been performed, a strong presumption in favor of its legality is raised. It has also held that any person objecting to the illegality of a marriage must prove such illegality and that the burden of such proof rests upon the person alleging it to be illegal.

The Supreme Court has always held, since the case of *Johnson v. Johnson* (114 Ill. 611) that all marriages are legal until proved illegal, and where a marriage cannot be proved to be invalid, it is a true and proper marriage. Similar rulings have been held in the cases of:

Barber v. The People (203 Ill. 543).

Crysler v. Chrysler (310 Ill. 74).

Criss v. Industrial Commission (348 Ill. 75).

From these rulings it may readily be determined that the Court deems that marriage should be held sacred and inviolate.

Inasmuch as there is no evidence known to your Fund which definitely proves that the marriage of Pauline Holofchak to Walter E. Noonan is invalid, we are of the opinion that Pauline E. Noonan must be held to be the true, lawful widow of Walter E. Noonan.

U. S. MARITIME SERVICE

(No. 12039—*Policemen's Annuity and Benefit Fund—G. F. M.—May 7, 1956.*)

In response to your request for an opinion concerning certain pension credits of Patrolman Roy E. Stilwell, the following is submitted:

Your letter states, and your records show, that Patrolman Roy E. Stilwell was born July 6, 1893; that he joined the Chicago Police Department on May 9, 1924; that on August 1, 1943, he was granted a leave of absence to join the Merchant Marine service; and that he returned to active police duty on January 9, 1946.

Your letter further states that on July 14, 1947, the Corporation Counsel issued an Opinion stating that the Retirement Board of the Policemen's Annuity and Benefit Fund had no power or authority to grant any pension credit to Patrolman Stilwell for the period of time that he served in the Merchant Marine. This Opinion was brought before the Retirement Board at its meeting, and there appears in the Minutes of that meeting the following:

"It was moved and seconded that for annuity purposes the Board grant Officer Roy E. Stilwell credit for service rendered by him in the United States Maritime Service, subject to adjustment in the event the law pertaining to military credit is not amended at the next session of the legislature to definitely provide for the granting of such credit as is now allowed by the City Council resolution pertaining to credit for military service. Roll call: * * *.

"It was then moved and seconded that the Board direct the attorney for the Board to prepare an amendment for presentation to the legislature in the year 1949 amending that section of the law concerning the granting of credit for military service. Roll call: * * *."

Your question is as to whether or not Officer Stilwell is, at the present time, entitled to receive credit for pension purposes for the period of time he was in the United States Maritime Service, more commonly known as the Merchant Marine Service.

In the year 1949 this Assistant prepared such amendment, as directed by the Retirement Board of the Policemen's Annuity and Benefit Fund, and submitted the proposed legislation to certain members of the legislature who agreed to sponsor it. The action of the legislature with regard to such proposed legislation was as follows:

"House Bill 39
Marzullo, Gorman, Finucane and Ruddy.

Amends the Title and Sections 1, 2, and 4 of an Act authorizing municipal corporations to preserve civil service and pension rights of their employees inducted into or enlisting in the Armed Forces of the United States, and adds Section 4½ thereto. Includes within the provisions of this Act all employees entering the Maritime service of the United States, and makes the provisions of this Act affecting them retroactive to March 26, 1941.

Jan. 25. Introduced. Committee on Personnel and Pensions.

Feb. 16. Recommended do pass.

Feb. 23. First reading.

Mar. 11. Tabled."

(Final Legislative Synopsis and Digest for the year 1949, Vol. 24, P. 265.)

It will be seen from the above quotation that the proposed legislation was not adopted by the legislature. Therefore, the Act entitled "An Act authorizing municipal corporations to preserve civil service and pension rights of their employees inducted into or enlisting in the land or naval forces of the United States, or ordered to active duty in the military or naval forces of the State (Ill. Rev. Stats. 1955, Ch. 24½, Section 150, et seq.) remained unchanged.

You may be interested to know that a check of the records in this office indicates that Officer Stilwell, prior to his taking a leave of absence from the police force of the City of Chicago in order to return to the Merchant Marine service, was the subject of an Opinion written by the Honorable Fred V. Maguire on September 22, 1943, addressed to Commissioner of Police Allman. This Opinion informed Commissioner Allman that Officer Stilwell would not be entitled to receive any credit for pension purposes during his period of service in the Merchant Marine.

We are therefore of the opinion that Officer Roy E. Stilwell is not entitled to receive from your Fund any credit for pension purposes for the period of time during which he was serving in the Merchant Marine.

"SALARY YEAR" IN COMPUTING ANNUITY

(No. 12046—*Policemen's Annuity and Benefit Fund—G. F. M.—June 18, 1956.*)

In response to your request for an opinion concerning the method of computing retirement annuity of one John A. Doyle, the following is submitted:

Your letter states and your records disclose that John A. Doyle was born May 27, 1899; was appointed to the Police Department on June 8, 1922, and was injured in the performance of an act of duty on September 27, 1926; that, effective February 1, 1928, the Retirement Board of this Fund awarded him duty disability benefit in the amount of \$137.50 per month, and he has never returned to active duty; that on May 27, 1956, the duty disability benefit of John A. Doyle was terminated because he had reached the age of fifty-seven years. Your letter further states that his annuity was computed according to the terms of Section 16½ of the Act governing your Fund, and, in arriving at the amount of the retirement annuity, five months of the year 1956 were considered, at the salary of \$5,045.00 per annum, which is the amount appropriated for the rank of patrolman for the year 1956; that for the years 1955, 1954, 1953, and 1952, the actual amounts appropriated for the rank of patrolman were used, and for the year 1951, seven months at the rate of \$3,900.00 per annum, which was the amount appropriated for patrolmen; that because Mr. Doyle is fifty-seven years of age and has an allowed service credit of 33 years, 11 months and 19 days, 52% of the average salary of the last five years of his service was considered, which produced the amount of \$2,379.60 per annum, or \$198.30 per month. Your letter further states that a letter has been sent to your office by Mr. Michael F. Ryan, addressed to Mr. Joseph P. Fitzgerald, Secretary of the Retirement Board, disputing the method used in determining the amount of the retirement annuity of John A. Doyle.

Your question is whether or not the method used by your office in computing this amount is correct, or whether the method set up in the letter of Mr. Ryan should be used in determining the amount of annuity to be paid the policeman in question.

Mr. Ryan's letter points out that Section 12 of the Act governing your Fund (Ill. Rev. Stats. 1955, Ch. 24, Section 956) provides that the word "salary" means "the annual salary appropriated as salary for members of

the rank or grade of such participant or contributor in the annual budget or appropriation bill of the City." He also invites your attention to the provisions of Section 1.10 of Chapter 131, Illinois Revised Statutes 1955, which point out that "year" means "calendar year" unless otherwise expressed.

It should be noted that Section 1 of Chapter 131 provides as follows:

"In the construction of statutes the provisions of Sections 1.01 to 1.22, inclusive, shall be observed, unless such construction would be inconsistent with the manifest intent of the General Assembly or repugnant to the context of the statute."

Certainly it was not the "manifest intent of the General Assembly" that a member of your Fund should be given credit for time during which he did not work, or for salary which he did not receive.

Section 16½ of the Act governing your Fund (Ill. Rev. Stats. 1955, Ch. 24, Sec. 960½) provides in part thereof as follows:

"Notwithstanding the provisions of any other Section or sections of this Act, any future entrant who shall resign or be discharged from the service on or after the effective date of this amendatory Act and after he shall have completed twenty-five or more years of service and attained an age of fifty-five years and for whom the amount of annuity provided in accordance with other provisions of this Act shall be less than the amount stated hereinafter in this Section shall have a right to receive annuity as follows:

"Any such future entrant who shall be fifty-five (55) or more years of age at the time of his resignation or discharge from the service and shall have been in active service in the Police Department of such city for the last five years of his service, shall have a right to receive annuity from and after the date of such resignation or discharge, of an amount equal to fifty (50%) percent of the average salary for five consecutive years of highest salaries within the last ten years of service prior to resignation or discharge."

It is to be noted that the Act says "an amount equal to fifty (50%) percent of the average salary for five consecutive years of highest salaries within the last ten years of service * * *". This can only mean that the yearly salary must be for the year of service. The word "year," meaning salary year, therefore can only be used in connection with the word "year" as far as service is concerned.

It is a well known fact in the Police Department that entrance into such department is made on various dates throughout the year. It is also known that applicants for the Police Department are not sworn in on January first, and thus could not terminate their service on the last day of a calendar year. If calendar years are to be used in determining the amount of salary, they must also be used in determining the amount of service. If, on the other hand, the amount of service is the actual number of years that the policeman is in the service, then the salary to be considered must be the salary actually received by him during his period of service in the Department.

It must be remembered that in pension funds annuities are based on salaries received for services rendered. If only calendar years were to be considered, the last full calendar year of service and the four previous calendar years of service would have to be used in computing annuities, not some period of time in the future when no service is to be rendered by the annuitant. Under such a practice, a policeman could retire on the second day of the year and have his annuity based partially on a year during which he gave but one day of service.

If annuities were to be computed on a calendar year basis, then, in the case of Mr. Doyle, it would be necessary to take the salary earned in the

full year of 1951, 1952, 1953, 1954, and 1955, and disregard the entire year of 1956, since he was not in the service during the entire calendar year of 1956. Thus, under Mr. Ryan's theory, Mr. Doyle would not be entitled to receive credit for any portion of the year 1956.

As the salary paid to a policeman during his last year of service has been higher, generally, than the salary such policeman received during other years, the Retirement Board has always permitted the policeman's salary to be averaged in accordance with his years of actual service, so that such policeman might benefit from the higher salary paid to him during his last months of service.

Further, it is to be noted that Section 16½, hereinabove quoted, provides that the average salary for the five consecutive years of highest salary within the last ten years of service is the amount to be used in computing annuities. It would therefore be impossible to project any salary beyond the period of service in determining the amount of annuity that a policeman would be entitled to receive at the time of his retirement from the service.

The rule adopted by the courts in construing Statutes is that they shall be so interpreted as to give a reasonable and intelligent meaning to every provision, so far as possible. The legislative intent is found in the Act, and the words of the Statute must be reasonably interpreted to give effect to such legislative intent. (*Scott v. Freeport Motor Casualty Company*, 379 Ill. p. 155.) The Retirement Board, in giving policemen the benefit of the last year in which they worked by allowing them to receive annuity based on their average annual salary for that year, has been merely carrying out the intention of the legislature that the policeman's salary should be averaged over the five highest salaries, consecutive years of active service.

We are therefore of the opinion that the method used by the actuary of your Fund in determining the amount of annuity payable to John A. Doyle under the provisions of Section 16½ of your Act is correct and proper.

PUBLIC ACCESS TO LIST OF DISABILITY ANNUITANTS

(No. 12052—*Policemen's Annuity and Benefit Fund*—G. F. M.—June 29, 1956.)

In response to your oral request for an opinion as to whether or not names of policemen now receiving disability benefits should be made available to the Chicago American, a daily and Sunday newspaper, the following is submitted.

In the year 1945 the Legislature of the State of Illinois passed an Act having to do with annuity and benefit funds created by the Legislature (Ill. Rev. Stat. 1955, Chap. 127, Sec. 168-7 *et seq.*). This Act provided in a part thereof (Ill. Rev. Stat. 1955, Chap. 127, Sec. 168-8) as follows:

"Each such pension fund is hereby declared to be created in the public interest and for the general welfare of the State, and pursuant to the governmental powers of the State, separate and apart from the corporate purposes of the State and any city, town, municipal corporation or body politic and corporate in the State, and in which such pension fund is empowered to operate by virtue of the terms and provisions of the Act creating such pension fund."

The Act creating the Policemen's Annuity and Benefit Fund of Chicago provides in part thereof (Ill. Rev. Stats. 1955, Chap. 24, Sec. 990) for the payment of ordinary disability benefits to certain policemen. This section of the Act in one of the paragraphs therein provides in part thereof, as follows:

"To defray the cost of ordinary disability benefit the City shall contribute from revenue derived from taxes herein authorized to be levied for the purposes of the Fund the amount necessary for such purposes."

From the above and foregoing paragraphs it is apparent that the Policemen's Annuity and Benefit Fund is created in the public interest and for the general welfare of the State and is supported in part by revenue derived from taxes levied under the provisions of the Act governing the Policemen's Annuity and Benefit Fund. For the purpose of protecting the taxpayers of the City of Chicago and for the purpose of preventing the Annuity and Benefit Fund from being required to pay disability benefits to individuals who no longer are entitled to receive such benefits, any inquiry should be answered as to whether or not any person—a member of the Police Department—is now receiving ordinary disability benefits. It is difficult to see what benefit could be derived from disclosing the illnesses and disabilities of all individuals now receiving disability benefits from the Annuity and Benefit Fund. On the other hand, if a person or persons or an organization has information which might be beneficial to the Policemen's Annuity and Benefit Fund in reducing its disability list, such person or persons or organizations should come forward with such information as a service to the public. The above quoted sections of the Act provide, however, that the Pension Fund is not only in the public interest but that the disability benefits shall be paid from tax money received by the Fund.

It is our opinion that as the Annuity and Benefit Fund is created in the public interest that such list of disability beneficiaries may also be in the public interest and, therefore, the Chicago American should be permitted to have access to such disability benefit list.

CREDIT FOR LEAVE OF ABSENCE WITHOUT PAY

(No. 12082—Chief Budget Examiner—G. F. M.—October 23, 1956.)

In response to your request concerning the propriety of the City Council adopting a certain resolution, the following is submitted.

The material submitted with your request indicates that certain policemen rendered service while on leave of absence at a place and in a manner directed by their superior; that both of these policemen received pay from sources other than the Police Department; that the said policemen were not given credit in either the Police Department or the Policemen's Annuity and Benefit Fund of Chicago for such service; and that a resolution has been introduced in the City Council directing the Police Department to give service credit to each policeman for the period of time so worked in order that both policemen will be able to accumulate sufficient time to qualify for a 50% pension.

The Act governing the Policemen's Annuity & Benefit Fund of Chicago, in Section 49 (Ill. Rev. Stat. 1955, Chap. 24, Sec. 994) provides, in part thereof, as follows:

"In computing the term of service rendered by any policeman * * * the following periods of time shall be counted, in addition to all periods of time during which such policeman shall have performed the duties of his position, as periods of service for annuity purposes only * * * all periods of absence with whole or part pay. * * *"

It is to be noted that only "leaves of absence with whole or part pay" may be used to accumulate credit for annuity purpose.

To attempt to give the policemen concerned service credits for their special service performed in accordance with the direction of their superiors, by requiring the Police Department to change their records to show that they were working while such policemen were on leave of absence is contrary to the holdings of the Courts of Illinois.

In the case of *Peo. ex rel. Daniel Dragel v. Timothy J. O'Connor, Commissioner of Police, et al.*, 134 N. E. 2nd, 624; 10 Ill. A. 2nd, 196, the Court, in reversing the grant of certain service credits given to a policeman by the Circuit Court of Cook County, said:

"Time served in an unclassified position * * * is not 'actual service in the rank or grade from which promotion is sought' on which seniority rights may be determined under the rules of the commission."

An analogy may be drawn in that if the Circuit Court of Cook County cannot give credit for service where it is not earned, neither can the City Council give such credit.

In the case of *Hartman v. The City of Chicago*, 343 Ill. A. 103, the Appellate Court held that time served as a temporary could not be added to time served as a civil service policeman for the purpose of determining the rate of pay of a policeman, saying:

"Plaintiffs could not by performing services as temporary policemen gradually acquire civil service rights; to permit such a practice would nullify the purposes of the Civil Service Law."

It follows, therefore, that the service rendered on leave of absence cannot be added to time accumulated from active service and it is not proper for the City Council to adopt the resolution granting such service credit.

We are, therefore, of the opinion that it is not within the bounds of propriety for the City Council to adopt this resolution.

ACTING CHIEF SURGEON

(No. 12108—Retirement Board, Policemen's Annuity and Benefit Fund—G. F. M.—February 20, 1957.)

In response to your request for an opinion concerning the right of Dr. Pat Vitullo to receive certain credits for services rendered prior to his Civil Service appointment, the following is submitted.

Your letter states, and your records and those of the Secretary of Police show, that Dr. Vitullo was sworn in as a police surgeon on July 7, 1947; that he served as Acting Chief Surgeon of the Police Department until May 7, 1956; and that on that day he was certified as Chief Surgeon. Your question is as to the period of time that is to be considered as police service and how much is to be paid into your fund for such service.

Section 12 of the Act governing your Fund (Ill. Rev. Stat. 1955, Chap. 24, Sec. 956) defines a policeman as:

"Policeman: any person appointed and sworn or designated by law as a policeman of such city, and who has served, or is serving, or shall hereafter serve in the regularly constituted police department of such city as a policeman, * * * chief surgeon or police surgeon, * * * and member of the police force of such police department."

Section 59½ of the Act governing your Fund (Ill. Rev. Stats. 1955, Chap. 24, Sec. 1004a) provides that no annuity shall be paid "based on any salary paid to such policeman by virtue of a temporary appointment." This provision, however, was inserted in the Act in order to avoid the necessity

of paying annuities based on the salary attached to a higher position, such as a sergeant appointed acting lieutenant, or a lieutenant appointed acting captain, and then resigning under the provisions of Section 55 (Ill. Rev. Stats. 1955, Chap. 24, Sec. 1000) to receive an annuity based on such higher salary.

It was not the intention of Section 59 to deny the protection of the Fund to a policeman appointed and sworn and serving the Department, subject to the same hazards and dangers and being paid the same salary as a Civil Service brother officer in the same position, rank, or grade.

Section 41½ of the Act governing your Fund (Ill. Rev. Stats. 1955, Chap. 24, Sec. 985a) states, in part thereof, as follows:

"Any contributor to this fund (other than a member of the fire department of such city) who has served or hereafter shall serve as a member of the police department of such city for a period of ten or more years and who prior to becoming such member was in the employ of such city * * * and county * * * and was a contributor to and participant in any pension fund or any other annuity and benefit fund * * * shall have the right to pay into the annuity and benefit fund herein provided for an amount equal to the sum that would have accumulated to the credit of such policeman in this fund from deductions from his salary for annuity purposes on the date when such payment shall have been made into this fund if such policemen had been paying into the annuity and benefit herein provided for such sums as he actually paid into such pension fund or such annuity and benefit fund * * * no credit shall be allowed for any period of time for which salary deductions or contributions by the policeman concerned have not been paid into this fund."

It follows that Dr. Vitullo may pay into your fund the amounts that he paid into the other funds for services he rendered as a county employee, as a laborer and as a Field Health Officer, provided that he first pay into your fund for his police service.

We are, therefore, of the opinion that Dr. Vitullo is entitled to be credited with all his service from July 8, 1947 upon his paying into your fund the deductions that should have been made from his salary during that time, together with interest at the rate of 4% from the time each deduction should have been made until it is paid.

We are also of the opinion that after making the payments hereinabove set out and completing ten years of police service, Dr. Vitullo is entitled to receive credit in your fund for service rendered in other employment for the City of Chicago, County of Cook.

EMPLOYED IN ANOTHER BRANCH OF GOVERNMENT

(No. 12191—Board of Election Commissioners—G. F. M.—December 12, 1957.)

In response to your request for an opinion as to whether retired policemen may be employed by your Board as temporary help, the following is submitted:

The Appellate Court of the First District, State of Illinois, in the case of *Kelly v. The Retirement Board of the Firemen's Annuity Fund of Chicago*, 292 Ill. A. 390, said:

"If it be incongruous for a retired man to receive a salary in another branch of the service, that is a matter for the legislature to remedy."

At the present time there is nothing in the Act governing the Policemen's Annuity and Benefit Fund prohibiting retired policemen from receiving annuity benefits while working in another branch of the service of the City of Chicago.

We are, therefore, of the opinion that retired policemen may not only work for the Board of Election Commissioners, but they may also continue to receive the annuity they are now being paid by the Policemen's Annuity and Benefit Fund of Chicago while so working.

CONTRIBUTION FROM DETECTIVES

(No. 12223—*Policemen's Annuity and Benefit Fund*—G. F. M.—May 8, 1958.)

In response to your request for an opinion as to the basis for deductions from salaries of detectives, the following is submitted.

Your letter encloses a copy of a letter from the Hon. Dolores L. Sheehan, President of the Civil Service Commission, concerning the appointment of patrolmen as detectives.

A further check of the Civil Service Commission reveals the fact that patrolmen are not only elevated to the position of detectives, but are also removed from such position upon the order of the Commissioner of Police. While serving as such detectives, the men are known as "Patrolmen assigned as Detectives." Because the position of "Patrolmen assigned as Detectives" is not the result of a promotional examination, such position must be considered to be a temporary one.

Section 59½ of the Act governing your Fund (Ill. Rev. Stats. 1957, Chap. 24, Sec. 1004a) provides, in part thereof, as follows:

"Notwithstanding the provisions of any other section or sections of this Act, excepting section 12, no annuity, pension or other benefit shall be paid to any policeman or to the widow of any policeman, under or pursuant to any of the preceding provisions of this Act, general or special, based on any salary paid to a policeman by virtue of a temporary appointment; * * *"

These men, however, are classified as patrolmen even though assigned as detectives.

We are, therefore, of the opinion that for annuity purposes, deductions should be made from their salaries as such patrolmen only and not from the larger amount paid to detectives.

SERVICE CREDIT FOR MILITARY SERVICE

(No. 12297—*Policemen's Annuity and Benefit Fund*—G. F. M.—September 17, 1959.)

In response to your request for an interpretation of the amendment to Section 49 of the Act governing your Fund, the following is submitted.

In the 1959 session of the legislature, Section 49 of the Act was amended by adding thereto, the following italicized portion:

"In computing the term of service rendered by any policeman subsequent to the 31st day in the month of December, in the year in which this Act shall come in force and in effect in such city, the following periods of time shall be counted * * *:

All periods of time that a policeman shall have been engaged in the Military Forces of the United States of America, whether before or after becoming a policeman, provided, that such policeman shall have been on the eligible register for the position of policeman that existed prior to December 7, 1941; provided such policeman shall pay into this fund the same amount that would have been deducted from his salary had such policeman been in the police service during the period of time when he was so engaged in the Military Forces, of the United States.
* * *

From a cursory reading it would appear that a policeman would be entitled to receive service for the period of time he spent in the Military Forces, that is, from the date of his enlistment or drafting into the Military Forces of the United States until he was separated from the Military Forces provided that he was on the eligible register that existed on (and/or) prior to December 7, 1941; and provided, that he shall pay into the Fund the same amount he would have paid had he been a policeman during this period of time. The mere fact that a man may be on the eligible register for a policeman does not mean that he is a policeman. The man becomes a policeman only when he is called from such eligible register. Any man who served in the Military Forces prior to his certification was not a policeman and could not have become one until he was certified from the eligible register for policeman. Neither could he have had any money deducted from his salary and paid into your Fund until such time as he became a policeman. It must have been the intention of the legislature to give men who served in the Military Forces of the United States, while they were on the eligible register for the position of policeman, credit for such service from the time they actually were entitled to be certified to the police department.

It is, therefore, our opinion that men coming under the provisions of this section of your Act, are entitled to receive credit for Military Service from the time they were certified from the eligible register, until the date of the termination of their service in the Military Forces. To hold any other way would be to hold contrary to the intent of the pension laws throughout the states, and would also raise a question to the Constitutional validity of the Amendment.

The Military Service that a policeman performs after the time he would have been eligible to become a policeman by reason of certification to police service by the Civil Service Commission of the City of Chicago fits in with other provisions of the Act governing your Fund, and the granting of various credits therein.

It is to be noted that the Act requires payment by the policeman for such service prior to his receiving the credit therefor, and while the Act itself says nothing about the payment of interest on such amount so paid in, the Act generally provides that a policeman is required to pay into your Fund the same amount that would have been standing to his credit in the Fund from deductions made from his salary during the period of time that he was so engaged in the Military Forces.

Anyone who was a participant or a member of your Fund on December 31, 1953, is required to pay interest at the rate of 4% and any man who entered the service of the Police Department, or became a member of your Fund, after January 1, 1954, is required to pay interest at the rate of 3%.

We are therefore of the opinion that any policeman or member of your Fund who served in the Military Forces of the United States during the period of time that he was on the eligible register from December 7, 1941, shall be entitled to receive credit in your Fund for such Military Service

from the date that he could have first become a policeman in the City of Chicago, until the date when he shall become separated from the Military Forces of the United States. We are further of the opinion that when payments shall be made in order to receive such Military Service, interest shall be paid on such payments at the rate of 4% per annum if such policeman was a member of your Fund prior to December 31, 1953, and at 3% if he became a member after such date.

EFFECT OF A FELONY CONVICTION

(No. 12328—*Superintendent of Police—G. F. M.—April 14, 1960.*)

In response to your request for an opinion concerning Section 1.1 of the Act governing the Policemen's Annuity and Benefit Fund of Chicago, the following is submitted.

Section 1.1 provides as follows (Ill. Rev. Stats. 1959, Chap. 24, Sec. 945a) :

"Notwithstanding any other provisions of this Act, none of the benefits herein provided for shall be paid to any person who is convicted of any felony relating to or arising out of or in connection with his service as a policeman.

This section shall not operate to impair any contract, or vested rights heretofore acquired under this Act, nor to preclude the right to a refund.

All future entrants shall be deemed to have consented to the provisions of this Section as a condition of coverage."

In answer to your question as to whether or not a pension can be denied on the basis of this Section of the Act of an officer appointed before 1955, it is our opinion that inasmuch as pensions or annuities have been considered to be "bounties of government" and the fact that it has been held that the status of a pensioner is not fixed by the law existing when he joined the department, but by the law existing when he applies for a pension (*Pecoy v. City*, 265 Ill. 78, *Hughes v. Treger*, 264 Ill. 612), it is our opinion that this provision of the Act does apply to a policeman appointed before 1955.

The Act specifically provides that the felony must relate to or arise out of his service as a policeman.

The Act governing the Policemen's Annuity and Benefit Fund contains no provisions therein which would prohibit a policeman from receiving his pension after the commitment of any felony unless such felony arose out of or is related to his position in the service as a policeman.

As to whether or not it would be possible to bar payment of a policeman's pension if he was convicted, after retirement, for a felony which he had committed while in the Active service, if such felony arose out of his service, or was related to or in connection with his service as a policeman, it is our opinion that such a pension could be terminated under the provisions of Section 1.1 of the Act governing the Policemen's Annuity and Benefit Fund of Chicago.

In considering our opinion, it must be remembered that Section 1.1 of the Act governing the Policemen's Annuity and Benefit Fund of Chicago has never been tested or interpreted by a Court.

APPLICATION AGE CONCLUSIVE

(No. 12345—*Policemen's Annuity and Benefit Fund*—G. F. M.—
June 16, 1960.)

In response to your request for an opinion concerning James J. Barlow, the following is submitted.

Your letter states that you have received a letter from James J. Barlow, which reads in part as follows:

"I was appointed as a Patrolman of the Chicago Park District May 28, 1934. I was born August 6, 1901, which date was given to the Chicago Park District Policemen's Pension Fund. Later the Pension Fund changed my date of birth to August 6, 1897 and deductions for annuity purposes were stopped August 6, 1954.

My date of birth in the Civil Service Commission is August 6, 1901. I would like to know if I remain on the Police Department after August 6, 1960, if I shall be required to pay into the pension fund the amount of deductions from August 6, 1954 to August 6, 1958, and if interest will be added to these deductions by the pension fund."

The Act governing your Fund in Section 59 thereof (Ill. Rev. Stats. 1959, Chap. 24, Sec. 1004) provides:

"In the case of any Policeman who shall have filed an application for appointment as a member of the Police Department of such city, the age stated in such application shall be conclusive evidence of the age of such policeman for the purposes of this Act."

It follows that if you stated your date of birth was August 6, 1901 in the Civil Service Department of the City of Chicago, that age or date of birth will be conclusive as to the determination of your age in this Fund. It is also considered conclusive as to the determination of your age in the department. At the present time you are actually only 58 years and approximately ten months of age.

On August 6, 1954, you were actually 53 years of age, even though the Retirement Board of the Park Policemen's Annuity and Benefit Fund had for some undisclosed reason changed your date of birth to August 6, 1897. On January 1, 1960, you became a member of the Policemen's Annuity and Benefit Fund of Chicago. On that date your age in the Chicago Police Department was 59, the Civil Service date of birth being used. Section 16 of the Act governing this Fund (Ill. Rev. Stats. 1959, Chap. 24, Sec. 960) was amended in 1957 to provide in part thereof as follows:

"A. From and after the first day of the month of January of the first year after the year in which this Act shall come into force and effect in such city, 4%, and after January 1, 1954, 6%, and after August 1, 1957, 7% of each payment of the salary of each future entrant shall be deducted and contributed to the annuity and benefit fund hereinafter provided for. Such deductions shall be made at the time such salary is payable and shall be continued while such future entrant shall be in the service."

In the year 1957, at the time of the amendment to this Section of the Act (July 8, 1957) you were then 56 years of age. Inasmuch as the Act provides that deductions shall be made from your salary and paid into the Policemen's Annuity and Benefit Fund while you are in the service, it

follows that you will be required to make payments into the Policemen's Annuity and Benefit Fund, to make up for those deductions which were not taken from your salary from the period of August 6, 1954 to August 6, 1958.

On any payment made to the Policemen's Annuity and Benefit Fund of Chicago for deductions not taken from the salary of a policeman or the repayment of monies received from the annuity and benefit fund, interest at the rate of 4% is required to be added so the accumulation standing to a man's credit is equal to what would be standing to his credit if such deductions from his salary had been made during this period or such refund had not been secured. It therefore becomes necessary that a policeman repaying deductions that were not made, is required to pay interest from the date such deductions should have been made until they are paid by him.

We are therefore of the opinion that it would be necessary for you to pay into the Policemen's Annuity and Benefit Fund of Chicago an amount equal to the amounts that should have been deducted from your salary from August 6, 1954 until August 6, 1958, together with the interest that would have accumulated on such deductions during the same period.

D. LABORERS' AND RETIREMENT BOARD EMPLOYEES' ANNUITY AND BENEFIT FUND

USE OF AN ALIAS BY MEMBER

(No. 11788—Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M.—February 17, 1954.)

In response to your request for an opinion concerning Vito Salerno, also known as Vito Forlado, the following is submitted:

Your records disclose an individual known by the name of Vito Forlado became an employee of the City of Chicago by means of a Civil Service Appointment on or about April, 1926, and continued to work until he resigned from the service to receive an annuity from your Fund.

Shortly thereafter, it was discovered that Vito Forlado's correct name was Vito Salerno; for that reason his annuity was stopped for the purposes of investigation; it was learned that his (Forlado's) children used the name of Salerno, and Vito Forlado was directed to appear before the Retirement Board; upon being questioned, he testified that he had applied for naturalization papers under the name of Salerno in September, 1906, in the Circuit Court of Cook County, Illinois; that after the naturalization proceedings were over he was given a certificate of naturalization bearing the name of Vito Forlado; that as he was unable to read or write, he did not know that the certificate bore the name of Vito Forlado until after he had left the Court Room; that he has, as a result of this mistake, adopted the name of Forlado; and that thereafter was known generally by the name of Forlado.

There is no question but that this individual worked for the City of Chicago for a great many years. There are affidavits among the records signed by people who are prominent in this City, who are acquainted with Vito Forlado, who knew him during the time he was working for the City, and had known that he was a Laborer in the city's employ; and who so stated in their affidavits.

There is, however, the question before the Retirement Board as to whether or not Vito Forlodo, also known as Vito Salerno, was the person who signed the application of the Civil Service Commission for appointment as a Civil Service employee of the City of Chicago.

A photostatic copy shows that Civil Service Commission Application No. 146774 was signed with a "Cross" by an individual giving the name of Vito Forlodo; that the address given on the application is the same address at which the evidence in the file shows Vito Forlodo, also known as Vito Salerno, lived on or about this date in 1926. There further appears on this application the signature of one John Salerno.

In the file with the other affidavits heretofore mentioned is an affidavit by one John Salerno, whose signature, allowing for a lapse of twenty-eight years, appears to this Assistant to be the same as that on the application for Civil Service Appointment and which affidavit states that he is the son of Vito Salerno, also known as Vito Forlodo; that John Salerno was present at the time his father, Vito Salerno, also known as Vito Forlodo, signed the Civil Service Application in the year 1926; that he, John Salerno, saw Vito Salerno, also known as Vito Forlodo, place his mark on the application; and that he, John Salerno, signed as a witness to the mark of Vito Forlodo in the space provided for the signature of a witness, on the application for Laborers' Service.

There is also in the file a great many documents containing the results of a great deal of investigating work. Conferences have been held with Mr. Williams in charge of the naturalization records of the Circuit Court of Cook County and with Mrs. Wink, in charge of the naturalization department of the United States at the new Post Office Building. All these investigations tend to prove that the story told by Vito Forlodo may be correct.

There has been a careful search not only through all the files bearing on this matter, but by all available means to discover the exact status of Vito Forlodo, also known as Vito Salerno. There is not in the files any evidence which would stand up in Court to prove that Vito Forlodo, also known as Vito Salerno, is not entitled to be placed upon the annuity roll or could be denied an annuity.

Having considered all the material in the files and all of the evidence contained therein, and the research that this office has done, we are of the opinion that Mr. Forlodo is entitled to receive the annuity for which he applied, there being nothing that has not been properly explained and corroborated by information received from impersonal informants or public records.

ASSIGNABILITY OF BENEFITS

(No. 11909—Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M.—May 25, 1955.)

In response to your request for an Opinion concerning moneys payable to one George Breo, a member of your Fund, the following is submitted:

Your letter states and your records show that George Breo was injured October 18, 1948 and that, since that time, there has accrued to his credit certain moneys from your Fund; that at the present time Mr. Breo is still disabled and the moneys due Mr. Breo are to be disbursed; that a lawyer representing Mr. Breo has presented a power of attorney executed by Mr. Breo, and requests that the check be made payable to him on the basis of the power of attorney. Your question is as to whether or not the moneys must be paid directly to Mr. Breo.

Section 59 of the Act governing your Fund (Ill. Rev. Stats. 1953, Ch. 24, Sec. 1166) provides in part thereof as follows:

"All annuities, refunds and disability benefits granted under the provisions of this Act and every portion of such annuities, refunds and benefits shall be exempt from attachment or garnishment processes and shall not be seized, taken, subjected to, detained or levied upon by virtue of any execution or any process or proceeding whatsoever issued out of or by any Court for the payment and satisfaction, in whole or in part, of any debt, damage, claim, demand or judgment against any annuitant, refund applicant or other beneficiary hereunder, and no such annuitant, refund applicant or other beneficiary shall have any right to transfer or assign his or her annuity, refund or disability benefit or any part thereof, either by way of mortgage or otherwise, other than such portion of any refund payable to such refund applicant under the terms of this Section * * *."

From the above quoted paragraph of your Act, it is clearly the intention of the Legislature that any moneys payable from this Fund to any member thereof for any of its benefits shall be paid directly to such member; he has no right, in any way, to assign or transfer a part of his annuity. The act of granting a power of attorney to his Attorney by Mr. Breo, who is fully capable of receiving his own money, appears to be an attempt to transfer part of his benefits to such Attorney.

It is, therefore, our opinion that any benefits payable to Mr. Breo, in the form of disability benefits, should be paid directly to Mr. Breo and not to any assignee or attorney in fact.

FUNERAL EXPENSES

(No. 11980—Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M.—November 21, 1955.)

In response to your request for an Opinion concerning your right to make payments for funeral bills out of refunds, the following is submitted:

Your letter states and your records show that a number of refunds become payable by reason of the death of an employee who leaves no widow. In many of these cases the deceased is survived by heirs other than his own children. You have requested an Opinion as to whether or not you have a right to pay the funeral expenses of an employee who dies leaving no children, without a direction from the surviving heirs of such employee. Section 39 of the Act governing your Fund (Ill. Rev. Stats. 1955, Ch. 24, Sec. 1146) provides in part thereof as follows:

(e) "In any case in which an amount equal to the total amount accumulated to the account of a deceased contributor from sums deducted from the salary of such contributor for annuity purposes shall not have been paid to such contributor, and in the case of a married male contributor, to such contributor and the widow of such contributor both together in form of annuity before the death of the last of such persons who shall die, an amount equal to the difference between the sum of such amounts and the entire amount paid in form of annuity or annuities without interest upon either such amount, shall be refunded and paid to the children of such contributor, in equal parts to each, unless such contributor shall direct in writing, sworn to before an officer authorized to administer oaths in this State and filed with the Retirement Board before the death of such contributor, that any such amount shall be refunded and paid to any one or more of such children;

and if there be no such children, such amount shall be refunded and paid to the Administrator or Executor of the estate of such deceased contributor; and if there be no such administrator or executor as aforesaid, then the money to be refunded may be applied toward the payment of burial expenses of such deceased contributor, and any balance remaining after the payment of such burial expenses shall be paid to the heirs of such contributor according to the law pertaining to estates of deceased persons."

Under the Section of the Act above quoted, the Retirement Board may, in its discretion, pay the funeral expenses of a deceased employee without the direction of any of the heirs of such deceased employee where there are not:

1. Any children of such employee.
2. An administrator or executor of the estate of such deceased person.

We are, therefore, of the opinion that funeral expenses of deceased employees may be paid out of refunds payable to the heirs of such deceased employees with the limitations hereinabove set out.

DEFAULTING BONDS

(No. 12178—Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M.—November 15, 1957.)

In response to your request for an opinion concerning certain bonds, the following is submitted.

Your records indicate that Board of Education 4½% Refunding Bonds issued September 1, 1934, due September 1, 1954, were purchased by your Fund in the amount of \$20,000.00; that interest in full was paid to March 1, 1954; that on September 1, 1954, these bonds with the last interest coupon attached were surrendered for payment; that your Fund received two letters from the City Treasurer to the effect that both principal and interest in the amount of one-eleventh were unpaid and have not since been paid; and that you request an opinion as to whether or not the one-eleventh loss, in the amount of \$1,818.20 of the principal and \$43.20 of the interest, may be written off the books of your Fund.

These bonds, part of an issue of Refunding Bonds, First Series, dated September 1, 1934, maturing September 1, 1954, aggregating \$5,500,000.00, were issued in amounts of \$5,000,000.00 Revaluing Fund Bonds and \$500,000.00 in Educational Fund Bonds, Second Series. With the exception of \$500,000.00 in Educational Fund Bonds, the bonds were paid at maturity from proceeds of taxes levied for that purpose. Tax Anticipation warrants of 1928 to 1929 were paid with the proceeds of the Educational Fund Bonds.

The Illinois Supreme Court held, in brief, that this Bond issue to the extent of one-eleventh was invalid, due to having originated from the refunding of tax warrants, *i. e.* that a tax warrant is payable solely from the tax against which it was specifically issued, and did not constitute a legal obligation to the point where further taxes could be levied for its retirement.

We are, therefore, of the opinion that defaulted portion of these bonds will never be of any value and should be stricken from your books.

ERRONEOUS JOB APPLICATION

(No. 12182—Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M.—November 21, 1957.)

In response to your request for an opinion concerning William Tauchen, the following is respectfully submitted.

Your records indicate that William Tauchen was born April 12, 1894; that on April 10, 1929, an application to the Labor Service for William Tauchen was filled out by his brother-in-law, Edward Gaize; that the application was stamped by the Civil Service Commission "Received April 10, 1929; "that William Tauchen was appointed to a civil service job in the Labor Department; that there are certain defects in the application in that the brother-in-law gave the wrong age for William Tauchen; that in answer to the question "Who wrote the answers to the above questions?" he signed the name "William Tauchen" instead of his own; and that there is some question as to whether or not he is entitled to be a member of your Fund.

The Civil Service Commission of the City of Chicago accepted William Tauchen as an applicant and appointed him to a position in the Service based on an incorrect application; however, the City of Chicago accepted him on the basis of an application filled out for him by his brother-in-law, and William Tauchen was nonetheless appointed to a Civil Service position in the Labor Department. He worked in such position, with occasional layoffs, from 1929 to the present date. William Tauchen has had deducted from his salary, during the period of his work, salary deductions which were paid into your Fund and which have accumulated to his credit in your Fund.

In the instant case the Board is not the proper party to question whether or not Mr. Tauchen was properly given a Civil Service appointment. The only persons who would have a right to question whether or not he was so appointed would be the Civil Service Commission who appointed him. Once a man has been appointed by the Civil Service Commission to a position in the Labor Department he is entitled to membership in your Fund as long as he is the person so appointed.

We are, therefore, of the opinion that William Tauchen is entitled to participate in your Fund and receive its benefits.

FUNERAL EXPENSES

(No. 12203—Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M.—February 14, 1958.)

In response to your request for an opinion as to whether or not your Fund may pay the funeral bill of a deceased employee without the consent of the heirs of such employee, the following is submitted.

Your letter states that John J. O'Brien died October 29, 1957; that after the customary period of mourning he was buried by Thomas McInerney's Sons, undertakers; that the amount of the funeral bill was \$1,264.30; that there is some dissension amongst the heirs of John J. O'Brien as to whether or not the monies in your Fund shall be used to pay the funeral bill; that among the items on the bill is one for three (3) graves; that you desire an opinion as to whether or not such monies, which would ordinarily be paid to minor heirs, may be used to pay the funeral bill.

Section 39 of the Act governing your Fund (Ill. Rev. Stats. 1957, Chap. 24, Section 1146) provides in part thereof as follows:

"(e) In any case in which an amount equal to the total amount accumulated to the account of a deceased contributor from sums deducted from the salary of such contributor for annuity purposes shall not have been paid to such contributor, and in the case of a married male contributor to such contributor and the widow of such contributor both together, in form of annuity before the death of the last of such persons who shall die, an amount equal to the difference between the sum of such amount and the entire amounts paid in the form of annuity or annuities, without interest upon either such amount, shall be refunded and paid to the children of such contributor in equal parts of each * * *; and if there be no such children such amount shall be refunded and paid to the administrator or executor of the estate of such deceased contributor; and if there be no administrator or executor as aforesaid, then the money to be refunded may be applied to the payment of the burial expenses of such deceased contributor, and any balance remaining after the payment of such burial expenses shall be paid to the heirs of such contributor according to the law pertaining to the estates of deceased persons * * *".

It is to be noted from the above-quoted Section of the Act that the provision for the payment of the funeral bill precedes the grant of any refund to the heirs of the deceased and, therefore, it is not necessary for the guardians to sign over the refunds to the minors. It is not, however, within the purview of the Act that any moneys of the deceased should be used for the purpose of purchasing graves for others.

The records in your office indicate that John J. O'Brien was a bachelor and that he had never adopted any child or children. A check of the Probate Court records indicates that to the present time no estate has been opened for probate for John J. O'Brien. As there are no children of Mr. O'Brien and there has not been any estate opened for him in the Probate Court of Cook County, the Board may pay the funeral expenses resulting from his burial.

We are, therefore, of the opinion that under the provisions of the law governing your Fund above-quoted that the Board has a right to pay the funeral bill, less, however, two-thirds of the cost of the three graves charged on the bill, of John J. O'Brien, regardless of the age of his heirs. The balance remaining after payment of the funeral bill should be divided into five parts. Mrs. Elizabeth O'Brien, his mother gets two parts. His sister, Miss Mary O'Brien gets one part. His nephew, Dennis, son of Patrick O'Brien, deceased, gets one part, and his niece, Kathleen Patter, and his nephew, Thomas E. O'Brien, get one part divided between them (Ill. Rev. Stats., 1957, Chap. 3, Section 162 (Fifth)).

CONTRIBUTION FOR PAST SERVICE

(No. 12215—Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M.—April 18, 1958.)

In response to your request for an opinion concerning George Garrett, the following is submitted.

Your letter states and your records show that George Garrett began work for the City of Chicago as a laborer on October 12, 1933 on a temporary basis; that he continued to work as such laborer and on July 1, 1949 was blanketed in to Civil Service; that at the time of his becoming a Civil Service laborer he was 74 years of age; that no deductions have been made from his salary for annuity purposes; and that you request an opinion as to whether

or not Mr. Garrett may pay into your fund for all of his service back to July 1, 1935.

Section 12 of the Act governing your Fund (Ill. Rev. Stats. 1958, Chap. 24, Section 1119) provides in part thereof as follows:

"The following words and terms as used in this Act shall mean as follows, respectively:

"'Contributory', 'Contributor to this fund', or 'Employee': Any person who was, is or shall be employed by such city or by the board of education of such city in a position classified by the Civil Service Commission of such city as in the labor service thereof and who has been appointed or shall be appointed to such position under and by virtue of an Act entitled 'An Act to regulate the civil service of cities' * * * Excepting from and after August 1, 1951, when this definition shall include and this Act shall apply to said person employed by virtue of temporary appointment in a position classified by the Civil Service Commission of said City as in the labor service thereof * * * and provided further this definition shall not include and this Act shall not apply to any employee of said city nor to any person who enters the service upon or after his attainment of an age of sixty-five (65) years nor to any employee of a Park District * * *"

"'Present employees': Any contributor to this fund who shall be an employee of such city or the Board of Education of such city or any Retirement Board on the 30th day of the month of June of the year in which this Act shall become in force and effect in such city."

It is to be noted that the definition concerning a contributor to this Fund limits the age of sixty-five (65) to the date upon which a man shall enter the service and not to the age which a man has attained upon his entry into the Fund. As George Garrett had been a member of the Labor Department of the City of Chicago since 1933 he is entitled to contribute to your Fund and deductions should have been made from his salary starting July 1, 1949. Upon his payment into the Fund of the deductions that should have been made from his salary, together with the amount now payable for temporary service, he would be entitled to receive an annuity based not only upon such deductions and contributions but also upon his prior service credit, i.e. service rendered from the early periods during which he worked until the 30th day of June, 1935.

We are, therefore, of the opinion that George Garrett is eligible to pay into your fund for his service as a temporary employee. After such payment Mr. Garrett may retire and receive an annuity from your Fund.

WHAT CONSTITUTES SALARY

(No. 12236—Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M.—June 20, 1958.)

In response to your request for an opinion defining Salary as provided in Sections 12 and 40 of the Act governing your Fund, the following is submitted.

Section 12 of the Act governing your Fund (Ill. Rev. Stats. 1957, Chap. 24, Section 1119) provides, in part thereof, as follows:

"'Salary': Annual Salary: Provided, that in cases where the salary is appropriated or fixed or arranged on an annual basis, the actual sum which would be payable to an employee during the year if he worked the full regular, normal working time in the position in the

service held by him, at the rate of compensation, exclusive of overtime, appropriated or fixed as salary or wages for service in such position held by him, shall be considered the annual salary and the maximum annual salary of such contributor for such year. Where the salary or wage is appropriated, fixed or arranged on other than an annual basis, the applicable schedules outlined in Section 40 shall be observed to convert the salary to an annual and maximum annual salary basis, and the sum obtained when so converted to an annual basis shall be the specified and defined annual and maximum annual salary under this definition * * *

Section 40 of the Act governing your Fund was amended to fix a limitation as to the period of time for which an employee may receive credit for deduction purposes in your Fund for the performance of his normal and regular work in his position, exclusive of overtime or extra service. The question of what constitutes "overtime" or "extra service" is actually the determining factor in many instances, as to what an employee's salary may be. In that connection the Municipal Code of the City of Chicago (Chap. 25, Section 9) provides:

"Eight hours of labor shall be and constitute a day's work for all employees performing manual labor for the city. The provisions of this section shall not be construed to apply to or govern the police or fire departments, or any department or workshop where constant operation is necessary. Provided, however, that in all cases of necessity or emergency, superintendents, foremen or others in authority are hereby authorized to work their employees such number of hours as such necessity or emergency may require, but for all labor performed in excess of eight hours in any one day such laborer or employee shall be entitled to and shall receive pay at the rate of time and one-half for all such labor performed, except in those employments where there is an established scale of wages and hours which is usually and customarily paid for such excess time by employers generally within the city for like services, in which event such labor in excess of eight hours in one day shall be paid for according to the wage scale, hours and conditions so established.

"Provided, however, that all mechanics and skilled and unskilled laborers employed by the several departments or other agencies of the city government, excepting those employed in the pumping stations, shall be required to work only until twelve o'clock noon every Saturday."

Words and Phrases defines "overtime" as: "beyond the regular fixed working hours". Citing *Simpkins v. Martin Dye & Finishing Company*, 36 A. 2d (N. J.) 611, and *Goodman v. Moss*, 43 N. Y. S. 2d 381, 385.

All of these holdings indicate that if a man normally works six days a week at his position for a constant period of time without receiving overtime pay, the sixth day is not overtime.

We are, therefore, of the opinion that these employees, who regularly and normally work five and a half or six days a week, receiving one-half day's pay for the half day or the same pay for the sixth day that they receive for each of the five days perviously worked, are not employed on an overtime basis, and deductions should be made for annuity purposes based on the entire salary so received; provided, that the total of such salary deductions to be considered for any one calendar year shall not exceed an amount greater than that produced by the application of the proper salary deduction rates to the highest annual salary considered for annuity purposes for such year for the contributor concerned.

We are also of the opinion that a spasmodic or infrequent working by an employee for a half day or an additional day does not constitute regular work and, therefore, regardless of the amount paid for such work, must be considered to be overtime work, on which no deductions for annuity purposes may be made.

DUTY DISABILITY

(No. 12254—Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M.—October 13, 1958.)

In response to your request for an opinion concerning Mrs. Jessie M. Tracy, the following is submitted.

Your records indicate that Mrs. Tracy is a lunchroom attendant of the Board of Education; that on June 20, 1958, Mrs. Tracy was injured as a result of slipping on the floor in the kitchen of the school where she is employed; that the records of your fund indicate Mrs. Tracy went to a steel table where her clean uniform and apron was kept in order to take the clean uniform and apron and go to the locker room in order that she might place the clean uniforms in the locker for use the following day. Mrs. Tracy has claimed that the floor behind the dishwasher was wet with water and as a result her shoes became wet and slippery. Mrs. Tracy's hours are from 9:45 A.M. to 2:15 P.M. The accident occurred at 2:20 P.M. and Mrs. Tracy claimed that as her work had not been finished by the hour of 2:15 P.M. it had been necessary for her to remain to finish up the dirty dishes.

You have requested an opinion as to whether or not Jessie M. Tracy is entitled to receive duty disability benefits.

The Act governing your fund provides, in part thereof, (Ill. Rev. Stats. 1957 Chap. 24, Section 1153) as follows:

"Benefit to be known as duty disability benefit shall be provided for the contributors to this fund who shall become disabled as a result of injury incurred in the performance of any act or acts of duty * * *

Your Act does not contain any definition of what constitutes an "Act of Duty". The courts have held, in effect, that:

"Where there is no definition of what constitutes an 'Act of Duty' anything a person did in their line of duty is an 'Act of Duty'." (*Margaret Donovan v. The Policemen's Annuity and Benefit Fund of Chicago*, 263 Ill. 579.)

As it appears from the facts set out in your letter and the contents of your files that Jessie M. Tracy, although about to terminate her duty as a lunchroom attendant, had not actually either reported out or left the premises wherein her duty was performed it follows that she would be entitled to receive duty disability benefits from your fund.

We are therefore of the opinion that Jessie M. Tracy is entitled to receive duty disability benefits as a result of the injury she received when she fell on the kitchen floor as a result of her shoes having become wet from water on the kitchen floor by the dishwasher.

ADOPTION OF CHILD ANNUITANT

(No. 12261—Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M.—December 11, 1958.)

In response to your request for an opinion concerning child annuity payments to be made to the minor child of a former member of your fund, who after the death of her father and mother was adopted by her uncle and aunt, the following is submitted.

Your letter states that Edward Gruca, a member of your fund, died leaving him surviving Catherine Gruca, his widow, and a minor daughter, Pauline Gruca; that his widow Catherine was granted an annuity of \$25.00 a month to continue for 27 years and 11 months, and the minor child was granted a child's annuity at the rate of \$10.00 per month payable until her attainment of her age 18, which would occur on October 29, 1964, or her earlier marriage; that the payments were made to her mother as her natural guardian; that on June 21, 1957, Catherine Gruca died and because there was no guardian to whom the money could be paid, the child's annuity was suspended; that on January 24, 1958, Pauline was legally adopted by her mother's brother and his wife, Edward and Edwina R. Przybylski, being decree number A 1056-3; and that a copy of said adoption papers are on file in your office.

Your letter further states that you request an opinion as to whether or not Pauline Gruca Przybylski is entitled to receive an annuity from your Fund after such adoption.

Section 44 of the Act governing your Fund (Ill. Rev. Stats. 1957, Chap. 24, Section 1151) provides in part thereof, as follows:

"Annuity to be known as 'child's annuity' shall be provided for unmarried children the issue of contributors. Any such annuity shall be payable monthly, from and after the date of the death of the contributor parent of any such unmarried child, until the annuitant shall attain an age of 18 years or shall marry, whichever event shall occur first * * *."

Section 45 of the Act governing your Fund (Ill. Rev. Stats. 1957, Chap. 24, Section 1152) provides in part thereof, as follows:

"Child's Annuity, as hereinafter provided, shall be granted and paid for the benefit of any unmarried child, less than 18 years of age, the issue of any following described contributors to this fund, who shall die on or after the date on which this act shall come in force and in effect in said city; provided that such child shall have been born or been in esse before such contributor attaining an age of 65 years, and before he shall have resigned or discharged from the service. * * *

Any such annuity shall consist of amounts of \$10.00 per month for each child while the widow or widower of the deceased contributor parent of such child shall survive, and \$20.00 per month for each child while no such widow or widower shall exist; * * *

The Act does not in any way contemplate the stopping of such an annuity in the event the child of a deceased contributor to your fund is adopted. The adoption does not change the fact that the child meets all the requirements of the Act governing your Fund for child's annuity, i. e., she is the issue of the deceased contributor, is under the age of 18 years, and is not married. It therefore follows that Pauline Gruca Przybylski is entitled to receive an annuity not only from and after the date of the death of her father to the date of her adoption on January 24, 1958, but also until such time as she shall get married or attain age 18, whichever shall happen first.

We are therefore of the opinion that Pauline Gruca, now known as Pauline Gruca Przybylski is entitled to receive an annuity from your Fund by reason of the death of her father, and that the amount of such annuity should be the amount payable by reason of the death of both her parents.

REFUND OF DEDUCTIONS FROM OVERTIME

(No. 12284—*Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M.—May 20, 1959.*)

In response to your request for an opinion concerning the refund of deductions made from any salaries earned by over-time service, the following is submitted:

Your letter states and your records show that many times during previous years, members of your Fund have worked for a period of time at their position and at various rates; that some of this work consisted of over-time, for which over-time, such employees were paid; and that deductions were made in many instances from salaries or monies received in payment of over-time work.

Prior to the year 1957, Section 42 of the Act creating your Fund, (Ill. Rev. Stats. 1957, Chap. 24, Section 1149) provided simply that deductions should be made from the salary of an employee for services rendered for the total amount of salary or wages earned during any semi-monthly salary period, but not in excess of \$250.00.

Because the law governing your Fund had only a restriction as to the amount of earned salary, regardless of over-time upon which deductions would be made, and because no deductions were made by the pay-master's office from any salary in excess of the amount of salaries set out in the Act governing your Fund, no refunds are payable to any man who put in over-time prior to July 8, 1957. The account of any member of your Fund who worked over-time has been credited with the salary deductions made from over-time salaries, as well as with the corresponding City contributions for such salary deductions, which credits will be of benefit to the member and his wife.

In 1957, Section 42 of the Act governing your Fund (Ill. Rev. Stats. 1957, Chap. 24, Section 1149) was amended to read:

"In the matter of salary deductions for annuity purposes, under this Act, the total of such salary deductions to be considered for any one calendar year shall not exceed an amount greater than that produced by the application of the proper salary deduction rates to the highest annual salary considered for annuity purposes for such year for the contributor concerned."

It must be realized that there has been a difference between the Act governing the Municipal Employees' Annuity and Benefit Fund and the Act governing your Fund, in that the Municipal Employees' Fund have always excluded any over-time earning from credit in their Fund for annuity purposes, while the Act governing your Fund has permitted deductions to be made from over-time earnings.

We are, therefore, of the opinion that no refunds can be made of any deductions from salary for over-time service performed prior to July 8, 1957.

E. HOUSE OF CORRECTION EMPLOYEES' ANNUITY AND BENEFIT FUND

FILLING VACANCY ON BOARD OF TRUSTEES

(No. 11808—*House of Correction Employees' Pension Fund—G. F. M.*
—April 26, 1954.)

In response to your request for an opinion as to the filling of a vacancy on your Board, the following is submitted:

Your letter states that John E. Wagner was elected for a one-year period to represent retired members of your Fund; that Mr. Wagner died April 6, 1954; that his term does not expire until September 30, 1954; that this position is filled by means of an election held by mail; that it takes a considerable period of time not only to set up the machinery to handle the election, but to send out notices of election, to secure candidates, and to set a date for election and prepare ballots; that time will be needed to allow the retired employees to learn of the election and to vote and return the ballots; and that all of the retired employees know that there will be an election in September.

Your question is as to whether or not an election is required to be held before the regular election in September.

The Act governing your Fund (Ill. Rev. Stats. 1953, Chap. 67 Section 18 et seq.) provides in Section 5 thereof for the election of a trustee representing the beneficiaries every year at the time elections for other trustees are held.

Section 6 of said Act provides:

"All vacancies in said Board of Trustees shall be filled by a ballot as aforesaid."

referring to the provisions of Section 5 of said Act. The provisions of Section 5 state:

"At each election, beneficiaries shall elect one of their members to serve as a member of such board of trustees for a term of one year."

As the Act governing your Fund contains no provisions for the holding of special elections to fill the vacancy caused by the death of a trustee, we are of the opinion that the election to be held to fill the Trusteeship formerly held by John E. Wagner; deceased, is to be held at the same time as the election for trustees to represent the active members of your Fund.

WIDOW'S ANNUITY

(No. 11880—*House of Correction Employees' Pension Fund—G. F. M.*
—February 7, 1955.)

In response to your request for an Opinion concerning Robert DeSalvia, the following is submitted:

Your letter states that Robert DeSalvia was an employee of the House of Correction for over twenty years; that in April of 1940 he was suspended;

that in 1947 he attained sufficient age to receive a pension and has, since that time, been drawing a pension. At the time of Mr. DeSalvia's suspension he was single; prior to his applying for and receiving pension from your Fund he married. Your question is as to whether or not, in the event of Mr. DeSalvia's death, Mrs. DeSalvia is entitled to receive a widow's pension from your Fund.

Section 8 of the Act governing your Fund (Ill. Rev. Stats. 1953, Ch. 67, Sec. 24) provides in part thereof as follows:

"Upon the death of any contributor or any beneficiary who before becoming a beneficiary contributed to said fund for at least two (2) years, the said board of trustees shall pay, as hereinafter provided, an annuity not to exceed seventy-five dollars (\$75.00) per month to the widow as long as she remains unmarried. Provided, she was the wife of such contributor or beneficiary during the period of time he was an employee of the house of correction and a contributor to this fund * * *."

The above quoted provision would bar the possible widow of Robert DeSalvia from receiving a pension from your Fund, as he was not an employee of the House of Correction at the time he married her, nor was he a contributor to that Fund since his marriage to her.

We are, therefore, of the opinion that the widow of Robert DeSalvia, under the conditions as they exist at the present time, is not entitled to receive a widow's pension from your Fund.

RIGHTS OF SUSPENDED EMPLOYEE

(No. 11881—House of Correction Employees' Pension Fund—G. F. M.—February 7, 1955.)

In response to your request for an Opinion concerning Walter Curran, the following is submitted:

Your letter states that Walter Curran was a member of your Pension Fund for a period of over twenty years; that on May 6, 1953, he was suspended, and that up to the present time he has received no pension from your Fund because he has not attained age fifty-five. Your question is as to what rights he and his wife have to receive benefits from your Fund.

Section 6 of the Act governing your Fund (Ill. Rev. Stats. 1953, Ch. 67, Sec. 23) provides in part thereof as follows:

"Any contributor to said fund who shall have been in the service of said house of correction for a period of more than ten (10) years but less than twenty-five (25) years and shall have contributed to the fund during his entire period of service shall have a right to receive from this fund after the attainment of age fifty-five (55) years an annuity of an amount equal to one-fifteenth (1/15) of the amount he would have received had he remained a contributor to this fund until he had been in the service for twenty-five (25) years, for each year of service over ten (10) years; provided, however, that service for a period of eight (8) months in any one calendar year shall be considered as a year of service for that year."

In accordance with this provision of the Act it would appear that Walter Curran is entitled to receive, upon his attaining the age of fifty-five, 1/15th of the annuity he would have received if he had twenty-five years of service, for each year of service over ten. If, on the day he left the service of the House of Correction, he had twenty years of service, he is entitled to receive

10/15th of such annuity, keeping in mind that eight months of service in any one year shall be considered a full year of service.

Section 8 of the Act governing your Fund (Ill. Rev. Stats. 1953, Ch. 67, Sec. 24) provides for an annuity of \$75.00 per month to the widow of a person in the same situation as Mr. Curran.

It is, therefore, our opinion that Walter Curran has the right to receive an annuity based on the 1/15th of his regular annuity for each year of service above ten years, and his wife is entitled to receive the same annuity as the widow of any other contributor with the same amount of service upon the death of her husband.

F. MUNICIPAL COURT AND LAW DEPARTMENT EMPLOYEES' ANNUITY AND BENEFIT FUND

RE-ENTRY AT AGE SIXTY-FIVE

(No. 11801—Municipal Court and Law Department Employees' Annuity and Benefit Fund—G. F. M.—April 12, 1954.)

In response to your request for an opinion interpreting certain sections of the Act governing your Fund, the following is submitted:

Your question is in regard to the status of a future entrant employee who left the service prior to age 65, at which time he was not eligible for annuity, does not make application for a refund at the time he became separated from service, and after attainment of age 65 is reappointed to the service. You wish to know whether or not such employee is entitled to participate further in your Fund and what, if any, his annuity rights are upon separation from service.

Section 38 of the Act governing your Fund (Ill. Rev. Stats. 1953, Chap. 37, Sec. 542) provides in part thereof as follows:

"5. Any such employee who shall have served less than ten (10) years and who shall not withdraw the amounts to which he shall have a right of refund, shall have a right to have all such amounts and all other amounts to his credit for annuity purposes on the date of his resignation or discharge from the service retained to his credit and improved by interest while he shall be out of the service at the effective rate and used for annuity purposes and the benefit of any person who may have any right to annuity through him because of his service, according to the provisions of this Act, in the event that he shall subsequently re-enter the service and complete the number of years of service necessary to obtain an annuity; but such sums shall be improved by interest to his credit while he shall be out of the service only until he shall have become sixty-five (65) years of age."

This above quoted passage of Section 38 covers all of the questions which have been set out in your letter, *i.e.*, a future entrant leaves the service prior to age 65 not eligible for annuity (having less than ten years of service) leaves his money in the Fund and is reappointed to the service after his attainment of age 65. It is to be noted that while interest on his accumulations stop at age 65 while he is out of the service, it does not prevent an employee from re-entering the service and contributing to the Fund in

order to be able to earn an annuity. The very wording of this Section, in fact, apparently anticipates that such an event may arise.

We are, therefore, of the opinion than an employee who leaves the service prior to the age of 65, not eligible for annuity, leaves in the Fund his accumulations, and after attainment of age 65 is reappointed to the service, is entitled to again participate in the fund and upon his separation from the service is entitled to receive an annuity, computed upon the total accumulations standing to his credit on the books of your Fund, if his total service (*i.e.*, service before his separation plus his service after re-entry), is such that he fulfills the requirements of the Sections of the Act governing your Fund pertaining to annuities.

RIGHTS OF ADOPTED CHILD

(No. 11915—*Municipal Court and Law Department Employees' Annuity and Benefit Fund—G. F. M.—June 20, 1955.*)

In response to your request for an Opinion concerning the rights of an adopted child, the following is submitted:

Your letter states and your records show that a member of your Fund, one Tessie Morris, had born to her, by a previous marriage, a son, Dalmain, in Waynoka, Oklahoma, on April 4, 1918; that some six years later this son was legally adopted by a family named Flatz, of Reynolds, Wisconsin; that ever since this son has been known as Dalmain Flatz; that at the present time the aforesaid Dalmain Flatz resides in San Diego, California; that on September 15, 1934, your participant married George F. Morris; that there were no issue as a result of this marriage; and that at the time of her death she was survived by George F. Morris, her second husband, and by her son, Dalmain Flatz.

Your question is as to whether or not under the above conditions, moneys are payable to her son, Dalmain Flatz, or to her surviving spouse, George F. Morris.

The matter of descent of property is the prerogative of the Legislature and, while descent statutes may be changed by the Legislature at any time, at the present time there is no bar to a natural child inheriting not only from his adopted parents, but also from his natural parents.

In the case of *In re: Tilliski's Estate*, 323 Ill. App. 490, 56 N. E. 2d 487 the Appellate Court of Illinois, Fourth District, held that where there is no Statute to the contrary, an adopted child may inherit from both its adopted parents and from or through its natural parents. On Page 487 (56 N. E. 2d, 487) the Court said:

"In view of the foregoing, it seems to us that the conclusion is irresistible that an adopted child in a legal sense is both the child of its adopting parents and its natural parents. We reach this result not only because the overwhelming weight of authority in the United States points in that direction, but to hold otherwise would be extremely unjust and unnatural. Consanguinity cannot be ignored in placing a meaning upon our adoption and descent statutes * * *."

We are, therefore, of the opinion that under the holdings of the Court in connection with adopted children and, under the Act governing your annuity and benefit fund, any refund payable from the account of Tessie Morris should be paid to her son, Dalmain Flatz.

SPECIAL ASSISTANT CORPORATION COUNSEL

(No. 11948—*Municipal Court and Law Department Employees' Annuity and Benefit Fund—G. F. M.—September 2, 1955.*)

In response to your request for an opinion as to whether or not Robert J. Nolan is eligible to contribute to your Fund for service rendered subsequent to August 7, 1955, the following is submitted:

The Executive Director of your Fund has forwarded to me two letters for consideration in connection with this matter, the first of which is signed by John C. Melaniphy, Acting Corporation Counsel of the City of Chicago. This letter appoints Robert J. Nolan Special Assistant Corporation Counsel to represent the City of Chicago in certain cases now pending before the Supreme Court. This letter also fixes the compensation that is to be paid on a monthly basis to the aforesaid Robert J. Nolan.

The second letter is addressed to the Chief Clerk of your Fund, signed by Robert J. Nolan, and discloses the following: Robert J. Nolan was a regular full-time member of the Corporation Counsel's staff at a salary of Sixteen Thousand (\$16,000.00) Dollars per year until August 7, 1955; that he had been a member of your Fund and deductions from his salary for pension purposes were made until that date; that on August 8, 1955, he was appointed Special Assistant Corporation Counsel for the purpose of handling certain matters of the city now before the Supreme Court of Illinois, which cases require preparation of the records and briefs, oral arguments, etc. In his letter he requests permission to pay into the Fund contributions which ordinarily would be deducted from his salary were he a regular Assistant Corporation Counsel rather than a Special Assistant Corporation Counsel.

Section 12 of the Act governing your Fund (Ill. Rev. Stats. 1953, Ch. 37, Sec. 516) provides, in part thereof, as follows:

"employee, * * * any deputy clerk, deputy bailiff or other person who was, is, or shall be employed in the service of the Municipal Court of such city, and any person employed in the personnel of the Law Department of such city whose position in the service of said Court or Law Department ordinarily requires actual performance of duty during less than ten months in each calendar year * * *".

In this instance, having to do with the appointment of Robert J. Nolan as a Special Assistant Corporation Counsel, it is noted from the context of his letters that he does not expect to be employed as a Special Assistant Corporation Counsel beyond December 31, 1955, and it appears that he will not be employed in that capacity beyond December 31st of 1955 which, apparently, would make his position in the service as requiring less than ten months. However, it must be remembered that Robert J. Nolan, at the time of his transfer from the position of Assistant Corporation Counsel to Special Assistant Corporation Counsel, had already performed duties in a position which, up to the time of his transfer, had taken seven months and seven days. It must also be noted that the work which Mr. Nolan will handle between August 7, 1955 (the date of the change in his title from Assistant Corporation Counsel to Special Assistant Corporation Counsel) is a continuation of the same work that he was handling in the Department prior to such change in title.

While it appears that there might be a conflict between this Opinion and one written December 22, 1947, having to do with the right of Sonia Gitlitz becoming a member of your Fund, the fact that Mr. Nolan is continuing the work which he performed prior to his appointment as Special

Assistant Corporation Counsel brings his position in the service within the definition contained in Section 12 of the Act governing your Fund, hereinabove set out. In the Gitlitz opinion it was held:

"It is immaterial how such a person is paid, so long as such person holds a position in the service of the Law Department requiring ten months of service during each calendar year. This requirement as to service necessarily excludes persons employed for specific purposes during a limited period, as for the trial of special cases, or other sporadic and occasional work incident to the conduct of the Law Department."

It must be remembered that the Appeals to the Upper Court which Mr. Nolan is handling, are required that the cases which he tried in the Lower Court might reach a final conclusion. His familiarity with the cases and the work which he did in connection with such cases earlier in this calendar year must necessarily be combined and thus he is taken out of the class hereinabove quoted from the Opinion dated December 22, 1947.

While it may be impractical for the Paymaster to deduct from any salary checks paid to Mr. Nolan the amounts which ordinarily would be paid into your Fund, it has been the practice of your Fund to permit such contributions to be made voluntarily.

We are of the opinion that Mr. Nolan is but continuing the work he formerly performed for the Law Department and, therefore, entitled to continue his membership in your Fund. Voluntary contributions should be made by him in the amount of the deductions that would be taken from his salary were it practical for the City so to take such deductions, to be credited to his account for all purposes of the Fund.

RE-ENTRY INTO SERVICE

(No. 12047—Municipal Court and Law Department Annuity and Benefit Fund—G. F. M.—June 19, 1956.)

In response to your request for an opinion concerning certain rights of T. Austin Loftus, the following is submitted:

Your letter states and your records disclose that Mr. Loftus was granted an employee's annuity by your Fund September 27, 1945, to begin September 17, 1945; that this annuity was terminated August 17, 1953, by reason of the reappointment of Mr. Loftus to the service on that date; that Mr. Loftus again became separated from the service on April 15, 1956, and made application for employee's annuity on May 15, 1956; and that, as of April 15, 1956, he had in excess of fifteen years of service and had attained age sixty-five.

You request an interpretation of Section 48½ of the Act governing your Fund (Ill. Rev. Stats. 1955, Ch. 37, Sec. 552.2) so that it may be determined whether or not Mr. Loftus is entitled to receive annuity in conformity with the provisions of the last paragraph of that section.

After setting up certain annuities payable to employees with a designated number of years of service, Section 48½ provides in part as follows:

"In lieu of the annuity provided in the foregoing paragraphs of this Section, or of any other section of this Act any employee having attained age sixty-five (65) and having completed at least fifteen (15) years of service as service is defined or computed in this Act shall, if the annuity provided in such foregoing paragraphs of this section or the foregoing sections of this Act is less than the amount stated in this paragraph, be entitled to receive a minimum annual annuity for life

equal to one (1) per cent of the highest average annual salary (as such average is defined and computed as stated in the first paragraph of this section 48½) for each year of his service plus the sum of twenty-five dollars for each year of service, such annual annuity to be paid in equal monthly installments, provided that no such minimum annual annuity can be greater than sixty (60) per cent of such highest average annual salary."

Prior to the paragraph hereinabove set out there is a paragraph in Section 48½ which provides as follows:

"The aforesaid provisions shall not apply in the case of any former employee who has been, or is, receiving an annuity from the annuity and benefit fund herein provided for, and who re-enters the service as an employee, unless such annuitant shall, after such re-entrance into the service, render at least three (3) additional years of service from and after the date of such re-entrance."

It is determined from your letter that Mr. Loftus had been an annuitant; that he reentered the service, but remained less than three years. You wish to know whether the paragraph immediately hereinabove quoted would prevent Mr. Loftus from receiving the benefits provided for in the last paragraph of Section 48½ of the Act governing your Fund.

In interpreting statutes, the Courts have held that the primary object in construing statutes is to ascertain the legislative intent expressed therein (*People v. Illinois Merchants Trust Co.*, 328 Ill. 223). The legislative intent in this case is apparent from the location in the Section of the provision hereinabove set out, requiring three years of service after reentrance into service in order that such service might be used for the purpose of computing annuities. Since this paragraph *precedes* the paragraph providing for payment of a specified annuity to employees who have attained age sixty-five and completed at least fifteen years of service, the words "The aforesaid provisions shall not apply * * * unless such annuitant shall * * * render at least three (3) additional years of service from and after the date of such reentrance" are not applicable. Instead, the legislature saw fit to place the paragraph providing for a minimum annuity for members having fifteen years of service and attaining age sixty-five at the end of the Section, and therefore it is not affected by the limitation concerning the return to work for a period of at least three years.

We are therefore of the opinion that Mr. Loftus is entitled to receive the benefits of the minimum fifteen year annuity, as is provided in the last paragraph of Section 48½ of the Act governing your Fund.

MEMBERSHIP FOR COURT CLERK'S ATTORNEY

(No. 12212—*Municipal Court and Law Department Employees' Annuity and Benefit Fund*—G. F. M.—March 26, 1958.)

In response to your request for an opinion as to whether or not William E. Gainer is eligible to become a member of your Fund, the following is submitted.

Your letter states that William E. Gainer was appointed by the Office of the Clerk of the Municipal Court of Chicago as attorney for such office; that Mr. Gainer was shown on the regular payroll, as are other employees of the Clerk's Office; that you have been advised by the Auditor of the Clerk's Office that Mr. Gainer's salary is charged to "Factual Services—Account No. 2200145" and not to "Personal Services", such as salaries and wages.

Section 14 of the Municipal Court Act (Ill. Rev. Stats. 1957, Chap. 37, Sec. 359) provides in part thereof as follows:

"The Clerk may employ an attorney whose salary shall be fixed by a majority of the Judges by an Order signed by them and spread upon the records of the Court, which salary shall be at least equal to the prevailing salary for comparable classes of position and services for the City Service of Chicago."

The budget for the City of Chicago for the year 1958 in the Municipal Clerk's Office section thereof, carries a section entitled "Professional and Technical Services". On the left hand side is the word "Code" with the figures "2200.145" followed by the word "Legal * * * \$10,000".

Section 12 of the Act governing your Fund (Ill. Rev. Stats. 1957, Chap. 37, Sec. 516) reads in part thereof as follows:

"The following words and terms as used in this Act shall mean as follows, respectively:

"'Employee: Any deputy clerk, deputy bailiff or officer of the Municipal Court of such city elected to office by vote of the people who elects to become a contributor to the Annuity and Benefit Fund herein provided for within ninety (90) days of the effective date of the 1957 Amendatory Act, if he is then such an officer of said Municipal Court, or within ninety (90) days after becoming an elected officer of said Municipal Court, or any other person who was, is, or shall be employed in the service of the Municipal Court of such city * * * ordinarily requires actual performance of duty during not less than ten (10) months in each calendar year * * *."

As Mr. Gainer is employed in a position set out in the Statutes in the State of Illinois having to do with the makeup of the Municipal Clerk's Office of the City of Chicago and whose position is further set out in the budget of the City of Chicago for the year 1958, there can be no doubt but that he is entitled to be a member of your Fund.

We are, therefore, of the opinion that Mr. Gainer is entitled to become a member of your Fund for the reasons hereinabove set out.

CHAPTER IV — RELATIONS OF CITY WITH OTHER GOVERNMENTS

A. FEDERAL RELATIONSHIPS

CONTRACTS FOR LOANS AND GRANTS UNDER F. H. A.

(No. 11855—*Housing and Redevelopment Coordinator—M. I. W.—September 24, 1954.*)

In your letter of September 7, you raise the question as to whether the City of Chicago has the power to enter into contracts with the federal government for loans and grants as provided in the Federal Housing Act of 1954.

The Housing Act of 1954 provides, in sections 304, 305 and 314, for contracts to be entered into with local authorities for loans and grants in aid, pursuant to the purposes of the Act and under the conditions imposed therein. We will not here review the varied provisions of the Act, nor discuss with particularity whether the City has power to carry into effect each of the various purposes the loans and grants are designed to serve. We see no serious question involved and will assume that, for all practical purposes, such power does exist. We thus confine this opinion to the sole question of the power of the City to enter into a contract for federal loans and grants in aid of performance of functions it is otherwise empowered to execute.

We understand that this question is raised since the federal agency administering this statute has stated it will insist that local governmental units participating in the program must have "authority to carry out the tasks assigned to them, including *authority to contract for any Federal aid requested by the locality.*"

It is a basic concept of the law of municipal corporations that cities have only that power expressly vested in them by the legislature and such powers as are necessarily incident to the powers expressly granted. *City of Chicago v. Ingersoll Steel & Disc Division of Borg-Warner Corporation*, 371 Ill. 183 (1939).

We have held that there is no obstacle to the acceptance of a gift by the City "made for some public purpose germane to the objects of the corporation." 10 Ops. Corp. Coun. 768 (November 19, 1918); 3 Ops. Corp. Coun. 37 (June 16, 1905). There is general agreement among text writers that, as a general rule, a municipality is authorized to accept a grant made subject to reasonable restrictions and conditions. 10 McQuillan, *Municipal Corporations*, 3rd ed., sec. 28.16 n. 79; Dillon on *Municipal Corporations*, 5th ed., secs. 981 and 982; 38 Am. Jur., sec. 484, p. 163.

Section 23-6 of the Revised Cities and Villages Act grants cities power:

"To borrow money on the credit of the corporation for corporate purposes * * *

There is no limitation found in this grant of power, nor are we aware of any rule of law or present public policy, which would render the government of the United States, its agencies and instrumentalities ineligible as a lender. The power of the City to borrow money, conferred by statute, is

subject only to limitation expressly made by law. *Tribune Co. v. Thompson*, 342 Ill. 503 (1930).

Given the power to accept grants and the power to borrow money, as stated above, there would seem to be ample authority for the City to enter into a contract of the kind contemplated under the 1954 Housing Act without any further legislative action.

This picture is somewhat clouded by the fact the legislature has from time to time chosen to grant specific authority to municipal corporations to enter into grant and loan agreements with the federal government for various programs. It might be argued that there is a presumption that, if such powers existed, there would have been no need for the legislature to act to grant specific authority, and it, therefore, must be presumed that no such power existed or exists unless specifically bestowed.

This argument can be met with a short answer. Section 38.01 of the Illinois Aeronautics Act contains a prohibition against any municipality within the state receiving directly any funds granted by the federal government under the Federal Airport Act. Following the reasoning outlined above, it could be argued that the legislature must have presumed that the cities had power to accept such aid, or why expressly prohibit it? It is apparent that argument in this case, that legislative action must have been designed to effect a change in what would otherwise have been the authority of municipalities, can be made with equal force from both sides, and is, therefore, of no substantial aid as a guide to what the law was prior to, or in the absence of, specific legislation.

An examination of the various statutes, enabling municipalities to participate in various funds, suggests a possible answer as to why specific authorizations of this type are found. In most cases, the power to accept such aid from the federal government was enacted as part of a larger act dealing with a specific subject matter (See for example par. 22-42, chap. 24, Ill. Rev. Stat. 1953, dealing with the establishment of contagious disease hospitals). Many of these statutes were enacted coincidental to a period of expanding federal aid programs and some may, indeed, have been inspired by the availability of federal assistance. In the situation where a federal government, having dealt traditionally with the states, desired to have it perfectly clear that municipalities had the power to deal directly on their own behalf, the specific recitals of such authority helped pave the way for easy negotiation. But this is scarcely equivalent to a condition of impotence to act without such legislation.

We, therefore, conclude that, even in the absence of specific legislation, the City would have the power to enter into a contract with the federal government for loans and grants in aid for urban renewal projects and for testing programs pursuant to the Housing Act of 1954.

In addition, we think it pertinent to point to paragraph 33a, chap. 29, Ill. Rev. Stat. 1953, which reads, in part, as follows:

"In addition to the right, power and authority expressly given and granted by any Act and not in limitation thereof all municipal corporations and political sub-divisions of this State (hereinafter called municipalities) hereby are authorized to apply for and accept grants and loans from and contract with the United States Government or any department or agency thereof as and when the same is created or empowered to act for the United States, for the purpose of aiding in financing the establishment, construction, improvement, extension, purchase or use of any public work project within the scope of or relating to the authorized corporate functions and operations or powers of the particular municipality and to sell or pledge therefor any securities which such municipality is authorized to issue. * * *

It is here suggested that a careful and deliberate effort was made in drafting this language, to grant to municipalities once and for all a blanket

authority to which they could point when attempting to participate in, or take advantage of the aid program of any federal agency "as and when the same is empowered to act" in relation to loans and grants, without having to resort to the seeking of additional state legislation. The purposes for which cities may apply for such assistance are broadly stated to include the "establishment, construction, improvement, extension, purchase or use of *any public work project within the scope of or relating to the authorized corporate functions and operations or powers of the particular municipality.*"

This is a broad grant indeed, and argument that there lies inherent therein a limitation that leaves outside the scope of this statute the activities envisioned under the 1954 Housing Act would appear to be dictated by unduly exercised caution. Yet, it has been suggested that such a limitation is found in the words "public work project."

The range of decisions as to what, under different statutory provisions, may be said to be embraced by the term "public work" suggests that this term is not to be automatically confined to its dictionary meaning without reference to the statute in which it is found and the purposes sought to be achieved thereby.

Thus, in the case of *United States to Use of Standard Furniture Co. v. Henningsen*, 40 Wash. 87, 82 P. 171 (1905) the Supreme Court of Washington rejected the suggestion that the term be given a narrow dictionary value and concluded:

"* * * that public work is susceptible of application to any constructive work of a public character, and is not limited to fixed works. The statute should be liberally construed to accomplish its purpose."

Public work has been defined as:

"A work in which the state is interested; every species and character of work done by the public, and for which taxpaying citizens are liable; work by or for a state and by or for a municipal corporation, and contractors therewith", *Carter v. City of Denver*, 160 P. 2d 991, 992 (1945); 50 C. J., p. 867, sec. 97.

In *State v. Butler*, 178 Mo. 272, 77 S. W. 560 (1903), the Supreme Court of Missouri set its guide for determining the meaning of public work as follows:

"In doing this, we should seek to give force and effect to the intention and purposes sought by the framers of this instrument."

The Court, in the *Butler* case, answered argument of counsel that collection of garbage was not public work with step by step elementary reasoning:

"To dispose of it (garbage) requires work. It must be handled and subjected to action of machinery for its disposal, all of which contemplates work. Is it public work? If not, what kind of work is it? The entire inhabitants of the city are interested in the work which results in the sanitary disposal. It is paid for out of the general revenue of the city, gathered from its taxpaying citizens. The municipal authorities contract for the performance of it. * * * If this is not public work as contemplated by section 27, we confess the term 'public work' is not susceptible of a definition."

Nor can it be argued that, while such a loose definition of "public works" has become acceptable to other jurisdictions, it is a stranger in Illinois law. The Illinois legislature itself, in another and unrelated act, defined "public work" as including "* * * any construction or repair work done under contract, and paid for in whole or in part out of public funds * * * " (par. 39s-2, chap. 48, Ill. Rev. Stat. 1953).

The criteria as to what constitutes public work as suggested by the above authorities when applied to the actions to be taken in connection with urban renewal projects under the 1954 Housing Act bring such actions well within the meaning of public works as used in the broad Illinois enabling statute quoted above. The program of urban renewal is substantially similar to that envisioned in the Illinois Urban Community Conservation Act (par. 91.8-91.16, chap 67½, Ill. Rev. Stat. 1953). These functions have been declared to be a public and, therefore, a corporate purpose. *People ex rel. Gutknecht v. City of Chicago* and *Zisook v. Maryland-Drexel Neighborhood Redevelopment Corp. et al.*, Nos. 33236, 33233, decided September 23, 1954. Thus the work to be done is "public." That "work" is involved is inherent in a program that will involve demolition, repair, construction and redevelopment. That we are dealing with "projects" is apparent from the language of the federal act itself under which the loans and grants will be made "for urban renewal projects." Section 302, Title III, Housing Act of 1954.

We are, therefore, dealing with a "public" "work" "project" and thus within the terms of paragraph 33a of chapter 29 cited above.

It is, therefore, our opinion that the City of Chicago has power to enter into contracts for loans and grants for urban renewal projects and for testing programs under the federal Housing Act of 1954.

CONSERVATION AREA

(No. 12022—Commissioner, Community Conservation Board—M. I. W.
—March 12, 1956.)

You have requested our opinion as to whether the area bounded on the north by W. Harrison Street, on the west by S. Ashland Boulevard, on the south by W. Roosevelt Road and on the east by an alley between S. Morgan Street and S. Miller Street (excluding therefrom the Chicago Housing Authority's public housing project known as the Jane Addams Homes) appears to be eligible for designation as a "conservation area" within the meaning of the Urban Community Conservation Act, as amended.

A "conservation area" is defined in section 3 of the Act as:

"* * * an area of not less than 160 acres in which the structures in 50% or more of the area are residential having an average age of thirty-five years or more. Such an area is not yet a slum or blighted area as defined in the Blighted Area Redevelopment Act of 1947, but such area by reason of dilapidation, obsolescence, deterioration or illegal use of individual structures, over-crowding of structures and community facilities, conversion of deleterious land use or layout, decline of physical maintenance, lack of community planning, or any combination of these factors may become such a slum and blighted area." (Par. 91.10, chap. 67½, Ill. Rev. Stat. 1955.)

It should be noted that the factors which must be found in an area before it will be regarded as meeting the above definition may be divided into two groups. The first relates to the size of the area, the devotion to residential use of structures in a given percentage of the area and the average age of such structures. Without meeting all three of these criteria, there can be no "conservation area" and the powers prescribed by the statute may not be activated. We shall, therefore, refer to these requirements as being "indispensable". The second group of requirements describes physical conditions which suggest decay and decline which may be evidenced by "any combination" of certain enumerated deteriorating factors. Not all of the enumerated conditions need be found, but there must be a combination of such factors which create a condition which would justify the Board in reaching

the conclusion that the area "may become * * * slum and blighted." Because they may exist in combination, we shall refer to this latter group as "variable" factors.

In requesting our opinion, you have furnished us with a copy of the City's application for federal funds to help finance surveys and planning for an urban renewal-conservation program submitted to the Urban Renewal Administration of the Housing and Home Finance Agency of the United States government. This application contains considerable data about the area and is the basis for discussion herein of the physical facts relative to this community. We have, of course, conducted no independent investigation of the area and base the conclusions expressed in this opinion on the facts presented by you.

The size of the area as shown in Table 4 of the Application is 205.7 acres which is substantially above the minimum statutory requirement of 160 acres. Table 4 also shows a total use. Excluding the 70 acres shown as devoted to use as streets and alleys, thus considering land use in terms of structures. 78.2% of the area appears to be devoted to residential use which is well over the 50% requirement recited in the statute. Your application further states that the median year in which residential structures were built was 1895, in the case of every block but one, and that the average age of all structures is more than 35 years, thus being beyond all statutory requirements.

According to these facts, the area appears to meet that part of the definition which sets forth what we have referred to above as the "indispensable" requirements.

Those factors which we have referred to above as "variable" include dilapidation, obsolescence, deterioration or illegal use of individual structures and community facilities, conversion of residential units into non-residential use, deleterious land use or layout, decline of physical maintenance and lack of community planning.

The data you have provided includes the following statements about the area in question:

In 1950, 11% of the dwelling units in the area were dilapidated. An additional 13% lacked private sanitary facilities. A spot check by your staff suggests that at the present time over 20% of residential structures are dilapidated, contain units without private sanitary facilities, are in a poor state of repair or have been converted to excessive densities. Population and structure densities are substantially higher than the City average. There is a critical lack of suitable open space for recreation. The principal commercial streets are characterized by marginal businesses, vacant stores and obsolete or deteriorated structures with substandard dwelling units above the stores. There is a lack of off-street parking and loading facilities and inadequate provision for interval truck and automobile circulation. All the schools are deficient in yard playground space.

These conditions obviously touch upon and fall within many of the enumerated "variable" factors.

It will be recalled from the definition recited above that mere existence of these factors does not automatically qualify an area as eligible under the Act. It is the existence of a combination of any of these factors by reason of which the area may become slum or blighted which makes for eligibility. This conclusion requires a judgment which the Legislature has devolved upon the Board and which lies within its peculiar competence.

Our expression of opinion is not as to whether this judgment should be made, but goes rather to the legal consequences attendant upon your making such a formal act of designation. Our opinion is limited to our estimate as to how we would expect to fare if called upon to defend, in a judicial forum, your judgment, as expressed in the act of designation.

Assuming verification of the facts you have described, and an ability to demonstrate continuing decline in the area, it is our opinion that we could probably sustain the proposition that the conditions existing in this area were such as to justify the Conservation Board in concluding that the area described herein was eligible for designation under the Community Conservation Act.

COMMUNITY CONSERVATION ACT—LIEN PROVISIONS

(No. 12111—*Chairman, Community Conservations Board—M. C. H.—*
March 12, 1957.)

This is to acknowledge the receipt of a letter to this office in which you asked why we do not consider a lien test under section 91.14, paragraph 7, chapter 67½ of the Urban Community Conservation Act, appropriate at this time.

Section 7 of the Urban Community Conservation Act, as amended, chapter 67½, paragraph 91.14, Ill. Rev. Stat. 1955, provides that after notice to an owner of property within a conservation area, said owner shall fail to make such property conform to minimum standards of governing ordinances, the corporate authorities of the City, upon the request of the Conservation Board, shall apply to the Circuit Court for an order permitting the City to bring the property in conformance with such minimum standards, and to charge and collect from the owner of the property the expense of making such repairs and improvements. This cost then becomes a lien upon the property, subordinate to all prior existing liens. Such lien must be filed within sixty (60) days of the completion by the City of repairs and improvements.

Paragraph 91.14, Ill. Rev. Stat. 1955, provides further:

“* * * However the lien of such municipality shall not be valid as to any purchaser, mortgagee judgment, mortgagor or other lienor whose rights in and to said real estate have arisen, subsequent to such repair or the improvements prior to the filing of the notice of such lien in the office of the Recorder of Deeds. * * *”

This provision gives the owner of said property an avenue of escape, in that he can dispose of the property immediately after the repairs and improvements have been completed, and thereby make it a personal liability instead of a lien on his real estate. It is therefore obvious that section 91.14 should be amended to protect the City's lien on the property upon which repairs and improvements have been made by the City, pursuant to an order of court. It is our suggestion that paragraph 91.14, Ill. Rev. Stat. 1955, may be amended to read that the court when issuing such order shall decree that the City of Chicago have a lien on the property in question for repairs and improvements made by it until such time that the indebtedness shall have been fully paid, or by amending the act to read that no purchaser shall acquire good title to such property upon which the City has made or caused repairs and improvements to be made within four (4) months from the date that said improvements have been completed, unless the owner of said property furnishes an affidavit of title that all work, labor and material furnished to, in, or about said property, have been fully paid for. Only then may we feel safe to bring appropriate action for the determination of the constitutionality of this section.

The fact that the lien provision provided for, is junior to existing encumbrances on the property, means that the City, in order to expect any recovery of expenditures, would have to confine this activity to those properties where there was sufficient value in the property, after repair, to satisfy prior and superior liens. Thus at best this route should be resorted to only in carefully selected situations.

Widespread use of this device, for bringing property in a conservation area up to the minimum standards, would involve a substantial capital outlay. The general conservation program now being discussed by the Conservation Board already involves a commitment of local contributions either in cash or so-called non-cash grants (*i.e.*, public improvements) which, even given the kind of bond issue funds informally being discussed for future referendum, would seriously burden the limited resources potentially available and already substantially committed under present planning.

Under applicable federal statutes pursuant to which the United States Government may make a matching contribution equal to two-thirds of the cost of a particular project, the local expenditures going to make up the local one-third contribution, may *not* include any monies expended directly for rehabilitation of particular properties (Section 110 of Housing Act of 1949, as amended, including the Housing Act of 1954). Thus, any local funds expended for this purpose not recovered by the City would not get the advantage of the two-for-one federal matching formula. On the other hand, an expenditure by the City (acting through the Conservation Board as to the same piece of property, whereby the City acquired the property by condemnation in its present condition and then conveyed same as provided by law to a private party who would cause the property to be improved and maintained in accordance with the approved conservation plan for the area, would be the kind of local expenditure which is eligible for federal matching.

For those properties which the Conservation Board would not want to acquire and resell, incurring whatever loss would be involved, there still remain the other tools presently used by the City for enforcement of building and housing standards which involve no cost to the City other than that involved in bringing of legal proceedings. Specific reference is made to the receivership action, and the request for other equitable relief including vacation of premises, the bringing or the threat of which has, in those cases in which it has been used, proved to be perhaps the most potent weapon for actually securing compliance that has yet appeared on the scene. It must be remembered that the lien provision in the Conservation Act and a similar (though not quite identical) lien provision adopted by the 1953 General Assembly as an amendment to the Cities and Villages Act (Section 23-70.3) were enacted prior to the time that the City's enforcement program included such procedures in equity. Repairs and improvements are thus paid for by the owners, or in the case of a receivership, are financed out of the profits of the properties involved which outlays are protected by the priorities granted by law to the receivership certificates. The success of these approaches in the limited number of cases in which they have been used speaks well for the possibility of obtaining compliance without the expenditure of capital funds. It is suggested that this method rather than a "lien" procedure can effectively secure the same results in the substantial majority of cases without the use of any City funds, the return of which are assured only by a junior lien.

A portion of the foregoing are the views of Maynard Wishner submitted to this office at the time when he was still acting as Counsel for the Urban Community Conservation Board in which we concur.

It is therefore suggested that no test case of the lien provision of Urban Community Conservation Act be made at this time.

COMMUNITY CONSERVATION AREA FINANCING

(No. 12142—Alderman, 5th Ward—M. C. H.—July 19, 1957.)

This is to acknowledge the receipt of your letter on behalf of the Subcommittee in which you state that you have been directed to request an opinion of us on the question "What public hearing must be held and what approval is required by the City Council in order to effectuate the City's application to have the South Shore area successfully designated for Section

220 financing under the Federal Housing Administration?" You further inform us in your letter that the Chicago Community Conservation Board approved the filing of such an application and that the Subcommittee desires to take whatever steps necessary or required to approve such application, and what recommendations it should make to the Committee on Planning and Housing and to the City Council.

The first step to be taken is to submit a request for clearance for planning to the H.H.F.A., coupled with a letter signed by the Mayor of Chicago, authorizing said request. The purpose of which is to secure the benefit and advice of the H.H.F.A., preliminary findings.

If H.H.F.A. clears the area in question the Community Conservation Board will take the following steps next:

1. Designation of the area by the Community Conservation Board pursuant to at least one public hearing held within the area as required under the Urban Community Conservation Act. The provisions of 91.12, Sec. 5 of the Act provides as follows: "Whenever the Board determines that an area within the municipality may be eligible for designation as a Conservation Area within the meaning of this Act, it shall make such investigation and hold such hearings as may be required, *including at least one public held within the area.* * * *" (Emphasis supplied.)
2. The Community Conservation Board is required under the Act to nominate and the presiding officer shall appoint no less than nine (9) nor more than fifteen (15) residents of such Conservation Area designated by the Board to serve as "Conservation Community Council" for their respective areas, to assist, advise and consult with the Community Conservation Board in the administration of the Conservation Plan within their respective areas.
3. The Conservation Board will next prepare a general workable Urban Renewal Plan and also an application for plan approval and Section 220 certification, both of which are to be submitted to the Chicago Plan Commission and the City Council for approval.
4. After the approval by the City Council of the Plan and application for Section 220 certification, the same will be forwarded by General Smykal, to the H.H.F.A. for approval and certification.

The foregoing, in our opinion, are the necessary steps to be taken by the Community Conservation Board and the City Council of Chicago before gaining approval by the H.H.F.A., of Section 220 certification under the prescribed government laws and Urban Community Conservation Act of the State of Illinois.

HATCH ACT

(No. 12166—Community Conservation Board—M. C. H.—October 1, 1957.)

This is to acknowledge receipt of your letter to this office in which an opinion on the Hatch Act is requested with reference to restrictions on political activities of officers and employees of state or local agencies, whose employment is in connection with any activity financed in whole or in part by federal loans and grants. Section 12 (a) of the Hatch Act provides as follows:

"No officer or employee of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any

Federal Agency shall (1) use his official authority or influence for the purpose of interfering with an election or a nomination for office, or affecting the result thereof, or (2) directly or indirectly coerce, attempt to coerce, command, or advise any other such officer or employee to pay, lend, or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, agency, or person for political purposes. No such officer or employee shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purposes of the second sentence of this subsection, the term 'officer or employee' shall not be construed to include (1) the Governor or the Lieutenant Governor of any State or any person who is authorized by law to act as Governor, or the Mayor of any city; (2) duly elected heads of executive departments of any State or municipality who are not classified under a State or municipal merit or civil-service system; (3) officers holding elective offices."

In the case of the *State of Ohio v. Civil Service Commission*, 65 Fed. Supp. 776, proceedings were instituted by the State of Ohio against the United States Civil Service Commission for withholding from its loans and grants of federal funds to the Ohio Bureau of Unemployment Compensation the sum of \$7200.00. The State of Ohio sought a review from said order under and pursuant to the terms of Section 12 (c) of the Hatch Act.

Harry J. Patterson was employed by the State of Ohio as manager of the Office of the Bureau of Unemployment Compensation of Ohio at a salary of \$3600.00 a year and his principal employment was in connection with activities financed in whole or in part by loans or grants made by the United States and by the terms of the said Hatch Act was forbidden to engage in any political activity.

The United States Civil Service Commission having found that Patterson did engage in political activities gave notice to the State of Ohio and requested the removal of Mr. Patterson in accordance with said provisions in Section 12 of the Hatch Act. The State of Ohio pursuant to said request gave Patterson another job contrary to the provisions of Section 12 of the Hatch Act. Thereupon the Civil Service Commission immediately deducted an amount of \$7200.00 equal to two years pay. In that case the court at page 780 said:

"It is quite apparent that when Congress sought to prevent 'pernicious' political activity by its officers and employees, it was exercising a right recognized by the Courts for many years. Therefore the purpose sought to be accomplished was legitimate and well within the powers of Congress to seek to accomplish. The question remains, however, whether or not a reasonable exercise of that power was made in the Hatch Act as it applies to the circumstances in the present case. 'If the end be legitimate, and within the scope of the constitution, all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect.' *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579 (Syl.)." The court further said (p. 781):

"The same question of whether or not the Act infringes the rights reserved to the States by the Tenth Amendment has been decided by other courts. The contention was given but short consideration in *Neustein v. Mitchell*, D. C. 52 F. Supp. 531, 532. The court disposed of the issue with one short paragraph: 'The constitutional question requires little consideration. Congress had power to attach proper conditions to loans and grants of federal funds. One of the conditions imposed by Section 12 (a) of the Hatch Act was that no "officer or employee" of any state or local agency financed by federal "loans or grants" should take "any active part in political management or in political campaigns." This clearly was a proper condition to the loans or grants to the state; and it is not open to the charge of coercion on the state.

Steward Mach. Co. v. Davis, 301 U. S. 548, 585, 57 S. Ct. 883, 81 L. Ed. 1279, 100 A. L. R. 1293. Under the Hatch Act the state is not even under compulsion to discharge an employee who has violated the statute. If the state wishes to retain an employee, it may do so; the only penalty is the withholding of federal loans or grants equal to two years' compensation of the offending employee. Section 12 (a) of the Hatch Act is valid. See *Stewart v. United States Civil Service Commission*, D. C., 45 F. Supp. 697." (Emphasis supplied.)

In the case of *State of Oklahoma v. Civil Service Commission*, 330 U. S. 127, the facts were as follows:

Francis Paris was a member of the State Highway Commission of Oklahoma engaged principally in activities financed in whole or in part by loans and grants of a Federal Agency of the United States. While so employed he also took an active part in the management of a political campaign to raise funds for the Democratic State Council Committee of the State of Oklahoma. The Civil Service Commission determined that these facts constituted taking an active part in politics and demanded the removal of Mr. Paris from taking any active part in any employment to which the Federal Agency contributed funds for the project either in whole or in part. In that case, the court at page 142 stated as follows:

"In *United Public Workers v. Mitchell*, decided this day (330 U. S. 75, ante, 754, 67 S. Ct. 556), we have considered the constitutionality of this provision from the viewpoint of interference with a federal employee's freedom of expression in political matters and as to whether acting as an official of a political party violates the provision in Section 12 (a) against taking part in political management or in political campaigns. We do not think that the facts in this case require any further discussion of that angle. We think that acting as chairman of the Democratic State Central Committee and acting *ex officio* as a member of the 'Victory Dinner' committee for the purpose of raising funds for selling war bonds constitute taking an active part in political management. While the United States is not concerned and has no power to regulate local political activities as such of state officials, it does have the power to fix the terms upon which its money allotments to state shall be disbursed." (Emphasis supplied.)

Section 595 of title 18 U. S. C. A. which deals with persons employed in the administrative position by the United States or any state or political subdivision, municipality or agency, provides as follows:

"Whoever, being a person employed in any administrative position by the United States, or by any department or agency thereof, or by the District of Columbia or any agency or instrumentality thereof, or by any State, Territory, or Possession of the United States, or any political subdivision, municipality, or agency thereof, or agency of such political subdivision or municipality (including any corporation owned or controlled by any State, Territory, or Possession of the United States or by any such political subdivision, municipality, or agency), in connection with any activity which is financed in whole or in part by loans or grants made by the United States, or any department or agency thereof, uses his official authority for the purpose of interfering with, or affecting, the nomination or the election of any candidate for the office of President, Vice-President, Presidential elector, Member of the Senate, Member of the House of Representatives, or Delegate or Resident Commissioner from any Territory or Possession, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

This section shall not prohibit or make unlawful any act by any officer or employee of any educational or research institution, establishment, agency, or system which is supported in whole or in part by any state or political subdivision thereof, or by the District of Columbia or

by any Territory or Possession of the United States; or by any recognized religious, philanthropic or cultural organization. June 25, 1948, C. 645, 62 Stat. 720."

The provisions in the above section are limited to any person employed in an administrative capacity and does not apply to the staff personnel employed by a political subdivision or municipality.

With respect to employees who may incidentally or occasionally work on the project financed by a Federal Agency in whole or in part, we at this time make no determination.

In view of the foregoing we take the position that any person whose principal employment is with the Conservation Committee Board's program which is financed with Federal funds in whole or in part, would in our opinion, come under the provisions of Section 12 of the Hatch Act.

Members of the Community Conservation Board who serve without compensation are not embraced within the provisions of the Hatch Act.

B. CHICAGO PARK DISTRICT

INSPECTION OF PARK DISTRICT INSTALLATIONS

(No. 11847—Commissioner of Buildings—A. F. G.—September 8, 1954.)

We have your letter of September 1, 1954 in which you say :

"The matter of the extent to which this Department should make inspections of installations on Chicago Park District property has been brought to my attention. The attitude seems to have prevailed in this Department that we have no responsibility in such areas, although I am unable to find anything in the Municipal Code of Chicago specifically relieving us from such responsibility.

The recent opening of the Ringling Brothers Circus in Grant Park, where temporary grand stands and electrical installations are in use without reference to this Department for permits and normally-required inspections, is an example of the subject situation."

In 1937 the enforcement of the electrical provisions of the code was under the jurisdiction of the department of streets and electricity. In answer to a request for an opinion by the acting commissioner of that department as to the power of his department to require the Chicago Park District to obtain permits and comply with the provisions of the electrical code in the installation of electrical apparatus on park property, we wrote the following opinion which appears in full in Vol. XIX of the Opinions of the Corporation Counsel at page 73:

"This will acknowledge receipt of your letter of March 15, 1937. You refer to the Chicago Park District and state that a question has arisen as to whether or not the Commissioner of Streets and Electricity has authority, by reason of the Chicago electrical code, to regulate the installation and alteration of electrical apparatus on property which is under the jurisdiction of the Chicago Park commissioners. You ask our opinion whether your department may compel the Park Board to obtain permits and comply with the provisions of the Chicago electrical code in the installation of electrical apparatus on Park prop-

erty including illuminated signs or other electrical apparatus on, over, or under streets and boulevards and supervised by the Park authorities.

The Chicago Park District is a municipal corporation and the statute with reference to its authority and powers reads so far as pertinent to the question presented as follows:

' * * * the Chicago Park District shall constitute a body politic and corporate * * *.

"The Chicago Park District shall be vested with all powers heretofore vested in park districts or corporate authorities whose authority is abrogated by this act or by the operation thereof. * * *

"The Chicago Park District shall have power to acquire, lay out, establish, construct and maintain parks, driveways, and boulevards in such districts, and to control, manage, and govern such parks, driveways, and boulevards, and the use thereof. * * * The commissioners of such district shall constitute the corporate authorities thereof, and shall have full power to manage and control all the officers and property of the district, and all parks, driveways, boulevards, and parkways maintained by such district or committed to its care and custody.

"The commissioners of the Chicago Park District may from time to time establish by ordinance all needful rules and regulations for the government and protection of parks, boulevards and driveways and other property under its jurisdiction; may exclude all objectionable travel and traffic and may make and enforce reasonable traffic and other regulations; and provide penalties not exceeding two hundred dollars for any offense for the violation of such rules and regulations.'

It will be noted that the statute vests the Chicago Park District with all the powers vested in park districts or corporate authorities whose authority was abrogated by the Chicago Park District act.

The powers vested in the several park authorities, whose authority was abrogated by the Chicago Park District act, were contained in various acts of the General Assembly. The powers granted by the different acts though were substantially similar, and in so far as relates to the question now under discussion the former park boards had full and exclusive power to govern, manage and direct the parks under their control; to lay out and regulate the same; to pass ordinances for the regulation and government thereof; to appoint such engineers, surveyors, clerks and other officers, including a police force, as might be necessary; to define and prescribe their respective duties and authority; to fix the amount of their compensation; and generally in regard to said parks, they possessed all the power and authority by law conferred upon or possessed by the City Council of the city of Chicago in respect to the public squares and places in the City.

One of the park districts superseded by the Chicago Park District was the West Chicago Park Commissioners. Before park consolidation, a case was brought to settle the question of the power of the city of Chicago to assess the lands embraced in the parks and boulevards under the control of the park board for the improvement of streets adjacent thereto or abutting thereon. After enumerating the powers of the park commissioners as set out above and other statutory powers, the court, after discussing fully the respective powers of the City and the parks, said:

'In view of these various statutory provisions, it is perfectly plain that the West Chicago Park Commissioners are a municipal corporation, created for the purpose of laying out, establishing, improving and maintaining, certain parks, boulevards and ways

within the territorial limits of the city of Chicago, and that it is given full and exclusive power and authority, not only to lay out and improve, but also to govern, regulate, manage, control and direct the same, and that its power and authority in all these respects are plenary, and exclusive of that of the city of Chicago.' (*West Chicago Park Commissioners v. City of Chicago*, 152 Ill. 392, 402.)

Inasmuch as the jurisdiction of park commissioners within the territory that they control, for the purposes for which they were created, are exclusive of the powers of the municipality in which such parks are located, and inasmuch as such park commissioners necessarily have certain police powers, the question has often arisen and arises here whether the police powers of the City do not conflict with the powers of the park boards in the management and control of their territory for park purposes extend over such territory. We think they do, but it is our opinion that the question of determining the character of electric lights used to illuminate parks, boulevards and driveways; the height and design of standards; the kind, type and location of electric traffic signals and other electrical equipment of similar nature installed in parks and boulevards is wholly within the power of the park board to regulate and the ordinances of the City relative thereto are not controlling.

However, in relation to buildings erected in parks within the city of Chicago, we think a different situation prevails. Park boards are given no police power concerning the construction of buildings, the prevention of fires, the making safe of dangerous constructions. The legislature by statute in this State has conferred on municipal corporations, such as cities, villages and incorporated towns, the police power to prescribe fire regulations and to regulate buildings within their limits in respect to fire protection (ISBS '35, chap. 24, art. V, pars. 61, 62, 63), and we believe that this power may be exercised over territory controlled by another municipal corporation.

In *County of Cook v. City of Chicago*, 311 Ill. 234, an injunction was sought by the County to restrain the City from enforcing its ordinance against the County in erecting a county jail. In passing on this exercise of the police power, the court said at page 247:

'We are of the opinion that the police power delegated to the city must be construed as between the county and the city, as a delegation of power to the latter which the former is expected to observe. * * * We are of the opinion that in enacting paragraph 63 of article V of the Cities and Villages act, and in using the language "and to cause all such buildings and enclosures as may be in a dangerous state to be put in a safe condition," the legislature intended to confer upon the city council such power over all of the buildings erected within the city as the words there indicate, including those of the county or other municipality located therein.'

We conclude, therefore, that in the installation of lights and other electrical equipment in the parks for park purposes, the jurisdiction of the Park District is exclusive, but in the installation of electrical equipment in buildings erected in the parks the ordinances of the City are enforceable."

The foregoing opinion appears fully to answer the questions propounded in your letter. In the case of the Ringling Brothers Circus referred to, we do not think there is any question of the power of the City to require a company which leases park property, erects temporary grandstands thereon, and installs electrical equipment therein, to take out permits and comply with all of the requirements of the building and electrical codes of the City.

PAVING STREET FOR PARK DISTRICT

*(No. 11888—President, Board of Local Improvements—T. J. M.—
March 23, 1955.)*

With your letter of February 10, 1955 requesting our opinion as to whether or not the Chicago Park District has authority to appropriate for the paving of City streets, you enclosed:

- 1) copy of your letter to Mr. George T. Donoghue, General Superintendent, Chicago Park District, of February 4, 1955.
- 2) copy of letter from Mr. Donoghue of February 9, 1955.

The subject street, Kildare Avenue, from the north line of W. 57th Street to the north line of W. 59th Street, is a public street under the control of the City of Chicago and adjoining property under the control of Chicago Park District.

Section 154, Chapter 105 (Ill. Rev. Stats. 1953), states:

“ * * * or whenever any public street, avenue or alley under the control of any city, town or village adjoining any public park, or pleasure ground under the control of any public park commissioners is in need of improvement or repairs, it shall be competent for said park commissioners and said city, town or village, from time to time, to enter into an agreement for the payment to such city, town or village, by such park commissioners, of such portion of the cost of the improvement or repair of such public street, avenue or alley, as may in the judgment of said commissioner be of benefit to said park or pleasure ground, or to enter into an agreement for the making of such portion of the improvements or repairs by said park commissioners to any such public street, avenue or alley adjoining such public park or pleasure ground
* * * ”

Section 155, Chapter 105 of said Statutes gives the commissioners the power to pay for such portion of the cost of such improvements or repairs of any public street, avenue or alley adjoining any such park or pleasure ground and further provides the ways and means of appropriating funds to make such payments.

Section 156 of Chapter 105 provides that the remainder of the cost of such improvements or repairs upon any such public street, avenue or alley shall be raised by the city, town or village, by general taxation or special assessment, as said city, town or village may determine.

We do not find any adverse decisions or law that would make it illegal for the Park Commissioners to enter into any agreement or contract as provided in Section 154, or to appropriate funds for the payment of same as set out in Section 155.

It is therefore our opinion that the Chicago Park District has authority to appropriate funds for paving portions of public streets adjoining its property.

CIGARETTE LICENSE FOR PARK DISTRICT CONCESSIONS

(No. 11916—City Collector—E. E. M.—June 24, 1955.)

We are in receipt of your letter requesting our opinion concerning the application of Sections 178-10, 178-21 and 178.1-2 of the Municipal Code of Chicago to concessionaires of the Chicago Park District who engage in the business of selling cigarettes at retail on Park District property.

The Chicago Park District was created pursuant to an Act approved July 10, 1933, to consolidate a number of Park Districts wholly or partly within the city of Chicago, and now comprises all the territory within the corporate limits of Chicago (Ill. Rev. Stats. 1953, Chap. 105, Secs. 333.1, 333.1a). It is not an enclave with all governmental powers of a municipality. It is a public corporation with limited powers, though exclusive, superimposed on the corporate limits and powers of the City of Chicago. Its power to govern relates only to the use of the parks, boulevards and driveways in the district (Secs. 333.7; 333.15).

It is a cardinal principle of municipal corporation law that "two distinct municipal corporations cannot exercise the same powers, jurisdiction and privileges in the same territory at the same time." (*People ex rel. Greening v. Bartholf*, 388 Ill. 445, 465.)¹ Powers explicitly granted to the City cannot be exercised by the Park Commissioners and the powers so granted to the Park District cannot be exercised by the corporate authorities of the City (*West Chicago Park Comr's v. City of Chicago*, 152 Ill. 392; *South Park Comr's v. City Ry.*, 286 Ill. 504).

This Department, on numerous occasions, has held that the City's ordinances relating to health, sales of liquor, licensing of stationary engineers, the inspection of weighing machines and the installation of electrical equipment may be enforced by the City authorities on Park District property (Ops. Corp. Coun., Vol. XVIII, pp. 35, 38-40; Ops. Corp. Coun., Vol. XIX, p. 73).

In *McCormick v. South Park Commissioners*, 150 Ill. 516, it was held that the powers of Park Commissioner are paramount to the powers of the City in so far as the control and management of the park property are concerned, such powers being within the purposes for which the Park Commissioners were organized; but, the City's police powers, beyond those granted to the Park Commissioners for the purposes for which they were created, extend over the whole city including park territory.

In regard to the imposition of the tax under Sec. 178.1-2, Article 9, Sec. 9 of the Illinois Constitution provides that local government taxes "shall be uniform in respect to persons and property, within the jurisdiction of the body imposing the same." In *Primm et al. v. City of Belleville, et al.*, 59 Ill. 142, this constitutional provision was construed and the court held:

"If the tax is for a corporate purpose, it must be uniform and co-extensive with the boundaries of the municipality." (p. 144.)

The law is clear that concessionaires of the Chicago Park District are subject to all the laws and ordinances governing the sale of cigarettes included in Chapter 178 and 178.1 of the Municipal Code.

ELECTRICAL PERMITS FOR PARK DISTRICT INSTALLATIONS

(No. 11959—Chief Electrical Inspector—A. F. G.—September 21, 1955.)

Recently you requested an opinion on the following two questions:

"1. Do we have a legal right to demand permits for work done by electrical contractors on Park District property?

2. Do we have a legal right to demand permits for work done by electrical contractors on O'Hare air field?"

In an opinion printed in full in Volume XIX Opinions of the Corporation Counsel at page 73, the subject matter of your first question was fully discussed. This opinion was written in answer to a request for an opinion, as to whether the electrical department may compel the Chicago Park District to obtain permits and comply with the provisions of the Chicago electrical code in the installation of electrical apparatus on park property including illuminated signs or other electrical apparatus on, over, or under streets and boulevards and supervised by the Park authorities.

After citing the various statutory powers of Park districts and quoting from a decision of our Supreme Court in which it was held that the power of Park districts is plenary and exclusive of that of the city of Chicago, we said:

"Inasmuch as the jurisdiction of park commissioners within the territory that they control, for the purposes for which they were created, are exclusive of the powers of the municipality in which such parks are located, and inasmuch as such park commissioners necessarily have certain police powers, the question has often arisen and arises here whether the police powers of the City which do not conflict with powers of the park boards in the management and control of their territory for park purposes extend over such territory. We think they do, but it is our opinion that the question of determining the character of electric lights used to illuminate parks, boulevards and drive-ways; the height and design of standards; the kind, type and location of electric traffic signals and other electrical equipment of similar nature installed in parks and boulevards is wholly within the power of the park board to regulate and the ordinances of the City relative thereto are not controlling.

However, in relation to buildings erected in parks within the city of Chicago, we think a different situation prevails. Park boards are given no police power concerning the construction of buildings, the prevention of fires, the making safe of dangerous constructions. The legislature by statute in this State has conferred on municipal corporations such as cities, villages and incorporated towns, the police power to prescribe fire regulations and to regulate buildings within their limits in respect to fire protection (ISBS '35, chap. 24, art. V, para. 61, 62, 63), and we believe that this power may be exercised over territory controlled by another municipal corporation.

* * *

We conclude therefore, that in the installation of lights and other electrical equipment in the parks for park purposes the jurisdiction of the Park District is exclusive, but in the installation of electrical equipment in buildings erected in the parks the ordinances of the City are enforceable."

We submit the conclusion reached above in answer to your question number 1.

O'Hare Air Field is owned by the City of Chicago. Nowhere in the Municipal Code of Chicago, is property owned by the City exempt from the fire and health regulations of the Code. The city architect advises us that in erecting engine houses, police stations and other city buildings the City takes out and pays for permits the same as any other owner. And, so our answer to question number 2 is in the affirmative.

CONSOLIDATION—CITY, PARK DISTRICT AND BOARD OF EDUCATION

(No. 12095—Mayor—J. C. M.—December 15, 1956.)

In January 1956 you requested that my office give consideration to the following propositions:

- (a) A complete consolidation between the City of Chicago and the Chicago Park District.
- (b) A functional consolidation involving (1) the police force of the Chicago Park District; (2) jurisdiction over the boulevards, drive-ways and streets used as thoroughfares for vehicular traffic, within and without the public parks; (3) the transfer of control over parks, playgrounds, recreational facilities and bathing beaches, now under the jurisdiction of the City of Chicago and the Board of Education, and (4) the personnel presently engaged in and the equipment and materials used in connection with the above facilities.

In connection with the preparation of this opinion, the Corporation Counsel and his Assistants have had the benefit of the counsel of Professor Rubin C. Cohn of the University of Illinois Law School, and Philip A. Lozowick, General Attorney of the Chicago Park District; the material contained in the "Report of the Mayor's Committee in re City of Chicago—Chicago Park District Consolidation (1949)" and the decisions of the Supreme Court of Illinois. We are of the opinion that much of the material contained in the "Report of the Mayor's Committee" is still pertinent to this inquiry and we are taking the liberty of quoting therefrom *verbatim* or in substance.

"The theory of separate corporate identity for park operation, management and maintenance appeared to be essential to the proper development of park services and facilities which in the main seek to serve the recreational, social and cultural needs of all the people of the community; that the history of park operation has consistently, from the time of its origin and throughout the years, been predicated upon a legislative policy which foresaw the need of isolating this phase of governmental functions from the control and supervision of the government of the municipality in which the parks were located; that park services and functions are specialized to a degree which requires the utilization of highly trained and special skills under a management independent of city government; that in terms of public necessity and welfare, the special functions of park district operation are relatively as important, if not more important, than the educational functions of a municipality and that consequently the same factors which dictated the necessity of a Board of Education free of city control are equally as valid in justification of independent status of the park district. In several cities a consolidation of an independent park board with the city government has proven unsatisfactory and in some instances where such a consolidation occurred an independent park board was subsequently re-established.

"The administration of park district services and functions by the Chicago Park District is universally conceded to be of exceptional excellence. From the time of the creation of the district, the commissioners thereof have established and enforced standards of administration in all phases of park district service which have merited the acclaim of the public, civic agencies devoted to the promotion of better government, cultural and recreational associations and religious organizations of all faiths. Its contribution in terms of social, recreational and cultural values made available to the people of the city, particularly in respect to molding the physical and moral character of the youthful population of the city along proper lines of development, is inestimable. The park district enjoys an enviable national, if indeed not international, reputation of municipal government at its best, and the standards and programs it has developed and instituted have been adopted as desirable patterns of approach in many communities throughout the nation and in some cases in Europe.

"In the area of public park administration the incentive for sectional pressures may be particularly acute. Parks and playgrounds have a tremendous appeal to all people. They fulfill basic needs. They are assets both visible and tangible. For these reasons it is imperative that the administration of park functions be vested in an agency so constituted that it can plan with integrity and independence, the furnishing of services on a basis consistent with city-wide needs. This has been the record of the Chicago Park District.

"The concentrated control within the present Chicago Park District framework appears to be more feasible to meet city-wide conditions rather than to have the overall authority in the City of Chicago, which might be exercised on the basis of sectional pressures."

It is fundamental that a complete consolidation of the governments of the City of Chicago and the Chicago Park District would have to be effected within the conditions and limitations contained in Article 4, Section 34 of the Illinois Constitution. The provisions of this section authorize the General Assembly to enact legislation (local, special or general) providing a scheme or charter of local municipal government for the territory now or hereafter embraced within the City of Chicago. The pertinent provisions are the following:

"The law or laws so passed may provide for consolidating (in whole or in part) in the municipal government of the city of Chicago, the powers now vested in the city, Board of Education, township, park and other local governments and authorities having jurisdiction confined to or within said territory or any part thereof, and for the assumption by the city of Chicago of the debts and liabilities (in whole or in part) of the governments or corporate authorities whose functions within its territory shall be vested in said city of Chicago, and may authorize said city, in the event of its becoming liable for the indebtedness of two or more of the existing municipal corporations lying wholly within said city of Chicago, to become indebted to an amount (including its existing indebtedness and the indebtedness of all municipal corporations lying wholly within the limits of said city, and said city's proportionate share of the indebtedness of said county and sanitary district which share shall be determined in such manner as the General Assembly shall prescribe) in the aggregate not exceeding five percentum of the full value of the taxable property within its limits, as ascertained by the last assessment either for State or municipal purposes previous to the incurring of such indebtedness, (but no new bonded indebtedness, other than for refunding purposes, shall be incurred until the proposition therefor shall be consented to by a majority of the legal voters of said city voting on the question of any election, general, municipal or special); * * *

The section further provides that no law based thereon, affecting the municipal government of the city of Chicago, shall take effect except upon referendum approval of the legal voters of the city.

The ambiguities of said section are so apparent it is difficult to chart a course of complete consolidation with the certainty of accomplishing the purposes without the probability of extensive litigation.

Article 4, Section 34 presents several difficult questions which have an important bearing upon the basic issue concerning the advisability of effecting a complete consolidation. As a preliminary observation, it should be noted that a statute providing for such consolidation must be submitted to a referendum. This opinion is concurred in by sound legal judgment.

The constitutional provision may be construed to require the City, in the event of a complete consolidation with the Park District, to assume not only the indebtedness of the consolidated municipal corporations, but also the City's proportionate share of the indebtedness of the county and sanitary district. This may possibly have serious restrictive effects in terms of the maximum 5% limit of bonded indebtedness. Of equal importance in connection with this matter is the parenthetical statement (Article 4, Section 34) which prohibits the city from incurring a new bonded indebtedness, except refunding bonds, after a consolidation has been effected. The applicability of this prohibition to a proposed consolidation of the city of Chicago and the Chicago Park District involves technical and difficult principles of construction of constitutional language. The obstructive language and the grammatical pattern of the section makes it extremely difficult to determine whether the parenthetical expression should be construed as qualifying only that preceding language in the section referring to the city's assumption of indebtedness of *two or more* municipal corporations lying within the limits of the city, which would not be the case if the city assumed only the indebtedness of the Chicago Park District or whether it applies to a consolidation only of the two municipal corporations. The issue can be clarified only by judicial test, and upon the assumption that the restriction under discussion would be held applicable to the consolidation of the two units, such a result might entail serious implications in respect to the city's fiscal powers. The contingency that a consolidation may result in undesirable limitations in areas of municipal finance in which proper discretion to incur indebtedness without referendum approval should be permitted appears to present a serious argument against the desirability of consolidation.

The provisions of Article 4, Section 34, present another risk of a serious and indeterminate character. As noted above, it is provided that no law based upon said section of the Constitution affecting the municipal government of the city of Chicago shall take effect except upon referendum approval of a majority of the legal voters of the city voting upon the question. This provision has been construed by the Illinois Supreme Court, in connection with the legislation establishing the Municipal Court of Chicago, to require referendum approval not only of the initial basic law creating said court but also of subsequent legislative amendments thereto. The same principle is applicable to any legislation which provides for complete consolidation of the city and the park district but to a potentially more serious degree. It is impossible to predict the extent to which any legislation affecting the municipal government of the city of Chicago must receive the consent of the electorate once a consolidation has been effected. Will the principle enumerated by the Supreme Court in the Municipal court cases be held applicable to future legislation affecting only park functions of the city or on a much broader scale? And even if held applicable only to legislation dealing with park functions, where is the line to be drawn between such functions and other city functions? For example, if enabling legislation permits the city to increase its tax for corporate purposes, must such act require referendum approval because park functions are included in the general rate for corporate purposes?

These are a few of the serious questions which suggest themselves in connection with this problem. These issues will most certainly be litigated and it is essential that this be so in order to establish coherence and stability in the exercise of municipal powers. The risk is that the judicial determinations will establish standards of municipal powers so restrictive

in scope as to seriously impair the exercise of normal city powers and functions. Once established, such standards could only be changed by constitutional amendments. An Act to consolidate in the government of the City of Chicago the powers and functions vested in local governments and authorities within the territory of said city was submitted to referendum and defeated on November 7, 1916.

Assuming that it is determined to have functional consolidation by transferring title or jurisdiction over city playgrounds, parks, beaches and bathing places, also personnel, to the Chicago Park District and to transfer to the City of Chicago control and jurisdiction over streets and boulevards, within or without the Park District, and maintenance, personnel and equipment used in connection therewith and the Chicago Park District Police Force, we have given consideration to either of the following two methods:

First, by a statute drawn under and pursuant to Section 34, Article 4 of the Constitution, which would require referendum approval by the voters of the city of Chicago.

(*Ptacek v. Coleman*, 364 Ill. 618, 622.)

(*People v. City of Chicago*, 310 Ill. 534.)

(*City of Chicago v. County of Cook*, 370 Ill. 301.)

This approach, however, may not be feasible on the ground that Article 4, Section 34 does not cover the suggested type of functional consolidation.

The second approach would be by enactment of a general law applicable to cities over 500,000 and park districts over 500,000 having coextensive geographic areas. In our opinion, such a general law would be sustained as not being local or special legislation within the meaning of the provision of Section 22 of Article 4 of the Constitution. (*People v. Davies Co.*, 375 Ill. 397, where the court held:

"Manifestly, the General Assembly may enact legislation affecting the City of Chicago other than by statutes based upon Section 34 of Article 4.")

One reservation must be noted with respect to an approach by general law. Section 18 of Article 21 of the Revised Cities and Villages Act, (Chicago's Little Charter) which authorizes the City to maintain and operate public parks and playgrounds, to acquire, improve, equip and maintain playgrounds, beaches and bathing places, contains a specification of powers which cannot be legally withdrawn from the City of Chicago without submitting the matter to a referendum. This Article was adopted by referendum and makes it irrevocable without further statute and referendum. (*City of Chicago v. County of Cook*, 370 Ill. 301, 309.)

To accomplish the objective by general law would require either that this Section remain unchanged, leaving the powers expressed in Section 18 for future application, or by amending Section 18 of Article 21 and submitting the matter to a referendum as a part of the total program of functional consolidation.

The legislative program to accomplish functional consolidation requires more than a primary bill. It will be necessary to have legislative amendments to a number of independent laws pertaining particularly to the pension and civil service status of employees of the city of Chicago, the Park District and the Board of Education who will be affected by the transfer; an amendment to the Chicago Park District Act, withdrawing authority over functions transferred to the City of Chicago; an amendment to the tax authority section of the Chicago Park District Act providing an adjustment therein relative to transfers affecting the Park District; similar adjustment relative to the Chicago Board of Education, and perhaps several other statutes which may have a relationship to this subject matter.

Prior legislative approaches to this matter have not given effect to the transfer of underground parking facilities now maintained by the Chicago Park District, although the matter is one for the City Council and the Chicago Park District to determine. It appears that there is some basis for suggesting the inclusion of these facilities in a functional consolidation since the maintenance of these facilities is directly related to traffic and highway or street regulation.

The portion used in connection with the underground parking facilities, including the widening of Michigan Avenue and the construction of vents and air intakes, is .37 of one acre. It appears that the Park District is the owner of the fee of that part of Michigan Avenue where the underground garage is constructed. The east line of Michigan Avenue was established as 90 feet east of the west line. The west line of the garage is 33 feet east of the east line of Michigan Avenue and extends east under part of Grant Park abutting Michigan Avenue as widened. The dedication was for public purposes and not limited to "park purposes." (*Michigan Boulevard Bld'g. Co. v. Chicago Park District*, 412 Ill. 350.)

Functional consolidation, as noted above, would transfer to the city of Chicago the obligations of the Park District to construct an additional part of the Randolph Street viaduct and a viaduct at Roosevelt Road and maintain others as provided in the Lake Front Ordinance.

If it is determined that a functional consolidation is the wiser course of action, we suggest that the presiding officer of the city of Chicago, the Chicago Park District and the Board of Education each appoint two or three persons to assemble the data relating to necessary adjustment of costs in salaries of personnel transferred from one to another, and pension funds (it is assumed the pension funds will remain intact to preserve the rights of the members thereof on the effective date of the legislation so as not to encounter inequities that would result in a transfer of such funds) in order to ascertain the differentials that will affect the tax rates of the Park District and the Board of Education and be able to provide in the necessary enactments the exact rates applicable after the effective date of such legislation.

We are presently preparing bills that would be required for a functional consolidation and will submit them within a short period of time.

BUILDING CODE APPLICABLE TO PARK DISTRICT

(No. 12106—Alderman 47th Ward—A. F. G.—February 8, 1957.)

We have your letter of February 6, 1957, which reads as follows:

"Your opinion is requested as to whether or not the Chicago Park District is bound by the terms and conditions of the Chicago Building Code in the erection of buildings by that District within the City of Chicago.

I am especially anxious to learn whether or not the terms and provisions of the Chicago Building Code apply specifically to the Wells Park Field House located in the 47th Ward."

On December 2, 1937 we sent to the commissioner of streets and electricity a rather lengthy opinion on the subject matter of your letter. This opinion is published in full in Volume XIX, Opinions of the Corporation

Counsel at page 73. After citing in this opinion the powers vested in the Chicago Park District, we said:

"Inasmuch as the jurisdiction of park commissioners within the territory that they control, for the purposes for which they were created, are exclusive of the powers of the municipality in which such parks are located, and inasmuch as such park commissioners necessarily have certain police powers, the question has often arisen and arises here whether the police powers of the City which do not conflict with powers of the park boards in the management and control of their territory for park purposes extend over such territory. We think they do, but it is our opinion that the question of determining the character of electric lights used to illuminate parks, boulevards and driveways; the height and design of standards; the kind, type and location of electric traffic, signals and other electrical equipment of similar nature installed in parks and boulevards is wholly within the power of the park board to regulate and the ordinances of the City relative thereto are not controlling.

However, in relation to buildings erected in parks within the city of Chicago, we think a different situation prevails. Park boards are given no police power concerning the construction of buildings, the prevention of fires, the making safe of dangerous constructions. The legislature by statute in this State has conferred on municipal corporations, such as cities, villages and incorporated towns, the police power to prescribe fire regulations and to regulate buildings within their limits in respect to fire protection (ISBS '35, chap. 24, art. V, paras. 61, 62, 63), and we believe that this power may be exercised over territory controlled by another municipal corporation.

In *County of Cook v. City of Chicago*, 311 Ill. 234, an injunction was sought by the County to restrain the City from enforcing its ordinance against the County in erecting a county jail. In passing on this exercise of the police power, the court said at page 247:

'We are of the opinion that the police power delegated to the city must be construed as between the county and the city, as a delegation of power to the latter which the former is expected to observe. * * * We are of the opinion that in enacting paragraph 63 of article V of the Cities and Villages Act, and in using the language, "and to cause all such buildings and enclosures as may be in a dangerous state to be put in a safe condition," the legislature intended to confer upon the city council such power over all of the buildings erected within the city as the words there indicate, including those of the county or other municipality located therein.'

We conclude, therefore, that in the installation of lights and other electrical equipment in the parks for park purposes, the jurisdiction of the Park District is exclusive, but in the installation of electrical equipment in buildings erected in the parks the ordinances of the City are enforceable."

We have held in other opinions that buildings erected in the city of Chicago by the Medical Center District, and the Chicago Regional Port District, each of which is a quasi municipal corporation of the same general character as the Chicago Park District and like it has been granted no police power to regulate the construction of buildings, such as has been given to the City of Chicago, are subject to the structural and other requirements of the building code of the City of Chicago.

POLICE RETIREMENT AGE

(No. 12239—Commissioner of Police—C. H. L.—July 14, 1958.)

We have before us your communication dated June 24, 1958, in which you state that:

"On January 1, 1959, the Chicago Park District Police Department will become integrated into the Chicago Police Department. It is my understanding that the Civil Service Commission of the City will take jurisdiction of employees coming into this department, and under the present system the Civil Service Commission orders this department to drop an employee from the rolls upon attaining the age 63."

You then ask our opinion:

"As to whether present Park District Police, after becoming members of the Chicago Police Department, will still be able to continue as active members until they attain the age 65, or will they be retired at the age of 63 as do our present employees."

Section 12 of the Cities Civil Service Act provides as follows:

"* * * that whenever the city council of any city in which this act is in operation, shall designate by ordinance or whenever any general law of the State shall designate any specific age of not less than sixty-three (63) years as the maximum age for legal employment of Policemen or Firemen in the service of any city which has adopted or shall adopt this act or shall designate any minimum age for the automatic or compulsory retirement of Policemen or Firemen in the service of such city any such Policeman or Fireman to whom such ordinance or law may refer or apply upon attaining said designated age of sixty-three (63) years or upwards as set out in said ordinance or law shall forthwith and immediately be retired from the service of such city in accordance with the terms or provisions of such ordinance or law. It shall be the duty of the civil service commission of such city to discharge or retire automatically any such Policeman or Fireman in the classified civil service of such city at the time and in the manner provided in such ordinance or law and to certify such retirement or discharge to the proper branch or department head: * * *"

The City Council has, in accordance with Section 12 of the Statute, designated the retirement age of policemen in the service of the City as 63 years. Section 25-37 of the Municipal Code of Chicago provides:

"The age of sixty-three years shall be the maximum age for legal employment of policemen and firemen in the classified civil service of the city. Every policeman and every fireman in the classified civil service of the city who has attained the age of sixty-three years shall forthwith and immediately be retired from service."

Rule VI, Section 5 of the Civil Service Commission's Rules provides:

"Section 5. Automatic and Compulsory Retirement of Policemen and Firemen. The age of sixty-three years shall be the maximum age for legal employment of Policemen and Firemen in the classified civil service of the City of Chicago. Every Policeman and Fireman of the City of Chicago who has attained or shall hereafter attain the age of sixty-three shall be automatically forthwith and immediately retired from said service. When any such Policeman or Fireman has attained

the age of sixty-three years the Commission shall forthwith and immediately enter an order retiring such Policeman or Fireman from the classified civil service. A copy of such order shall be immediately and forthwith certified to the head of the department concerned."

In view of the above provisions of the statute, ordinance and rule of the Civil Service Commission, it is our opinion that when the Chicago Park District Police Department becomes integrated into the Chicago Police Department, all its members up to the rank of Captain will become regular civil service employees of the City of Chicago, to all intents and purposes and will be retired at the age of 63 years.

CLEANING BOULEVARD UNDERPASSES

(No. 12321—Commissioner of Streets and Sanitation—A. F. G.—February 10, 1960.)

In your letter of February 2, 1960, you state that since the Bureau of Sanitation assumed the responsibility of cleaning the Park District Boulevards on January 1, 1959, the question has arisen relative to the responsibility for the cleaning of pedestrian underpasses. Said underpasses are situated wholly within the Chicago Park District and are for the convenience of pedestrians to enable them to cross over.

You furnish a list of these underpasses and request our opinion as to who is responsible for cleaning them.

Were it not for the fact that the terms "boulevards and boulevard appurtenances" are defined in the Act, we would be inclined to hold that the underpasses referred to in your letter, which provide facilities for pedestrians to cross boulevards safely and speedily, were "boulevard appurtenances," and under the jurisdiction of the city.

The Act defines "boulevards" and "boulevard appurtenances" in section 1 of the act as follows:

"(c) 'boulevards' means all boulevards, driveways, roadways and highways under the jurisdiction of a park district, both within and without the public parks proper, used as thoroughfares for vehicular traffic, including bridges, subways, viaducts and approaches appurtenant thereto.

(d) 'boulevard appurtenances' means parking meters, light posts and facilities used for lighting boulevards, traffic signs and signals." (Chapter 105, par. 333.51, Ill. Rev. Stats. 1959.)

It will be seen that neither of these definitions includes underpasses and we must assume that the legislature did not intend that they should be included. Where terms are used in an act, and the terms are defined therein, they should be construed in the light of the definition. Following that rule, we are of the opinion that the legislature did not intend that underpasses should be considered "boulevard appurtenances" and under the control and jurisdiction of the city as provided in section 2 of the Act.

It is our opinion, therefore, that underpasses remain under the control and jurisdiction of the Chicago Park District and the duty of cleaning them is not on the city.

C. CHICAGO HOUSING AUTHORITY

GARBAGE REMOVAL BY CITY

(No. 11791A—Commissioner, Streets and Sanitation—M. I. W.—
March 1, 1954.)

In your letter of January 25 you state that all Cooperation Agreements between the City of Chicago and the Chicago Housing Authority read in part as follows:

"Furnish to the Authority and the tenants of the projects the usual municipal services and facilities which are or may be furnished without cost or charge to other dwellings and inhabitants in the City."

You cite Section 99-18 of the Municipal Code of Chicago which sets up provisions for determining whether the owner of a building is or is not entitled to city service and which reads as follows:

"Except in the case of a multiple dwelling containing less than five living units, a multiple dwelling producing less than thirty-two gallons of refuse per week, or a multiple dwelling, each living unit of which is individually heated by the tenant, it shall be the duty of the owner of every multiple dwelling to cause to be removed at his own cost and expense at least once each week all refuse produced therein."

You request our opinion as to whether the above excerpt from the Cooperation Agreements should be interpreted as meaning that the buildings of the Chicago Housing Authority shall be subject to the same provisions as any privately owned building in determining what buildings shall or shall not receive City services.

In an opinion directed to you on February 20, 1951 covering this same subject, we carefully reviewed the then existing Cooperation Agreements which contained the precise language you quote, and Section 99-18 of the Municipal Code which read then as it does now. In that opinion we said:

"It is therefore our opinion that the Cooperation Agreements now in effect merely make it the duty of the City to furnish the same refuse disposal service to the sixteen housing projects of the Chicago Housing Authority covered by the agreements, which is furnished without cost or charge to other dwellings within the City in accordance with the above quoted provisions of section 99-18 of the Code.

It is also our opinion that it is the duty of the City to furnish the same refuse disposal service to the housing projects of the Chicago Housing Authority that are not covered by a Cooperation Agreement, which is furnished without cost or charge to other dwellings within the city, in accordance with the provisions of Section 99-18 of the Code for the reason that the provisions of said section do not differentiate between public dwellings and private dwellings."

Since the language of the Agreements and of the ordinance are still the same we therefore reaffirm the conclusion of the above opinion.

BOND FOR SIDEWALK COAL-HOLE

(No. 11822—City Comptroller—M. I. W.—May 20, 1954.)

We have your letter of May 17th, originated by the Superintendent of Compensation, stating that the Chicago Housing Authority has made application to occupy sub-sidewalk space at 155 to 159 N. Walcott Avenue, and to maintain eight coal holes in the surface of said sidewalk.

You further state that section 34-38 of the Chicago Municipal Code provides that every applicant desiring to secure a permit for the maintenance of openings must file a bond in the penal sum of \$10,000 and that the Housing Authority wishes to be relieved of filing a bond in this instance.

You request our opinion as to whether it is satisfactory to issue such permit without the filing of a bond.

Section 34-38 of the Municipal Code of Chicago reads as follows:

"Every applicant for a permit authorizing the disturbing of the sidewalk or the construction or maintenance of any coal hole, trap-door or other opening therein, shall file with the application a bond in the penal sum of ten thousand dollars, with surety to be approved by the commissioner of public works, such surety to be worth in the aggregate the sum of ten thousand dollars. Such bond shall be conditioned that the person to whom such permit shall be issued, his heirs, successors, or assigns, will save and keep the city free and harmless from any and all loss or damage, or claim of damage, arising from or out of the construction or use of the space, structure, vault, coal hole, trap-door, or other opening therein mentioned; and for the maintenance of the public way, or the sidewalk over such space, or containing such coal hole, trap-door, or other opening, as the case may be, in such condition that the said public way, or the sidewalk, shall, at all times after such structure, coal hole, trap-door, or other opening is completed or such space is covered, be safe for public use; and conditioned for the full and complete protection of the city against any and all litigation growing out of the granting of such permit of any thing done under such permit; and conditioned for the prompt vacation of the said space, vault, or any portion thereof, coal hole, trap-door, or other structure or opening mentioned in said permit, upon thirty days' notice from the commissioner of public works, whenever in the opinion of said commissioner of public works it shall be necessary or advisable to have the said vault or space, or any portion thereof, vacated, or the said structure, coal hole, trap-door or other opening removed, in order to provide for the use of the said space or vault or any portion thereof, for a public purpose, or because of the construction of a subway for transportation purposes in, under, or near the public way or public ground in which said space or structure is located, or for the purpose of moving, laying or maintaining street car tracks, sewers, drains, conduits, pipes, tubes or wires of any kind whatsoever because of the construction of such a subway; and conditioned further for the faithful performance and observance of all the terms and conditions of the said permit and of the various sections of this chapter dealing therewith.

Whenever the commissioner of public works determines that the sureties on any bond given for any permit issued hereunder have become insufficient, a new bond for such permit shall be filed, with sureties to be approved by said commissioner."

The ordinance requiring the bond speaks in terms of "every applicant" and provides for no exemptions.

However, relationships between the Chicago Housing Authority and the city differ in many respects from those existing between the city and property owners generally. The terms of these relationships are spelled out in co-operation agreements entered into by the city with the Housing Authority pursuant to statute.

The co-operation agreement covering the project in question makes no express provision for the waiver of this bond requirement, nor are we able to find any general provisions which could be construed as embracing the exemption here requested. (See Council Journal, January 20, 1950, p. 5764.) The bond requirement exists by virtue of an ordinance. In the absence of an ordinance modifying this requirement, it remains in full force and effect.

This view is further strengthened by section 10 of the Housing Authorities Act (Par. 10, Chap. 67½, Ill. Rev. Stat. 1953) which reads as follows:

"All projects of an Authority shall be subject to the planning, zoning, sanitary and building laws, ordinances and regulations applicable to the locality in which the project is to be situated."

It should be further noted that the requirement for the posting of a bond is not of the same order as the requirement for payment of permit and inspection fees which are paid into the general funds of the city and which the city may in turn use to defray the cost of services rendered. No part of the bond posted will ever inure to the positive benefit of the city. The conditions of the bond required are to save the city harmless from any unusual liability which may be imposed upon the city as a result of injuries to a third party flowing from openings constructed and maintained in the sidewalk, and to insure prompt vacation thereof when a proper order to that effect is issued. This is not revenue for the city but merely constitutes a safeguard for the city that it may rightfully exact for its protection from property owners. In the absence of any provision of ordinance or statute, this right to protection extends to property owned by the Housing Authority.

It is, therefore, our opinion that in the absence of any ordinance provision to the contrary, the Chicago Housing Authority should file a bond as required by section 34-38 of the Municipal Code of Chicago before a permit to occupy sub-sidewalk space and maintain coal-holes in the sidewalk is issued.

LEASING CENTRAL OFFICE BUILDING SPACE

(No. 11872—Housing Redevelopment Coordinator—J. D.—December 6, 1954.)

Your letter of September 2, 1954, requests that this office answer certain questions relating to the rental of space in the Reid-Murdoch Building by the Housing and Redevelopment Coordinator for the different Housing Authorities.

Your first question asks if the 1945 City bond issue funds can be used to improve the Reid-Murdoch Building for housing agencies and if so, to what extent. The City Council on April 16, 1945 (C. J. p. 3252) passed an authorization for the issuance of \$5,000,000.00 of slum clearance bonds of the City of Chicago and the ordinance provided for the levy of taxes in payment thereof. This bond issue is for the purpose of acquiring by purchase, condemnation or otherwise real property, the acquisition of which is

necessary for the rehabilitation or redevelopment of slum areas. As an additional purpose, the money could be used to demolish and remove dilapidated homes from the sites purchased. It is our opinion the money, raised by the sale of bonds, cannot be used for any other purpose than that set out in the ordinance authorizing same.

The second question asks whether or not the CHA can be recompensed by the City if they reduce the amount of space rented in the Reid-Murdoch Building. We are informed that the CHA anticipates spending considerable money remodeling the space to be rented in the building and expects through negotiations with the City to be recompensed by a rental agreement for the expenditure for remodeling. Should the CHA find it necessary to give up or reduce its space, the City could not repay to the Housing and Redevelopment Authorities any money expended for remodeling. We are of the opinion that the only way such a repayment could be handled would be to give to the CHA a lease for a definite term granting to them the right to sublease unused space.

Your third question asks whether the lease to the CHA could contain a provision for rental after the initial ten (10) year period. We are of the opinion that the City Council could enter into a lease for a ten (10) year period with an option to renew said lease beyond the initial period.

Your fourth question asks if City Council action is necessary for the rental agreement and our answer is "yes, as no one else has the authority to enter into a lease for that length of time."

Your fifth question (a) asks whether the City would provide additional space to the CHA if needed within the next ten (10) years. We are of the opinion that this is a matter of negotiation between the City of Chicago and the CHA. We feel that the lease entered into between the City of Chicago and the CHA could contain a provision for additional space after the ten (10) year period. This would have to be in the nature of a clause in the lease which would permit the CHA to have additional space in the Reid-Murdock Building if space was available at the time requested.

Your fifth question (b) asks who is the official now in charge of the Reid-Murdoch Building and who is the landlord. In answer to that question, the City of Chicago is the landlord and the real estate agent under the City Comptroller is the acting agent for the City of Chicago.

Your fifth question (c) asks if the City will take over the notes of the CHA if the CHA moves out of the Reid-Murdoch Building at some future time. We take it for granted that the notes will be issued for the remodeling of the Reid-Murdoch Building to accommodate the Housing Authorities. As said previously in this letter, the City is in no position and has no authority to take the CHA's obligation as its own and the only way by which the CHA could recover any money paid for remodeling would be by a subleasing agreement which would permit the CHA to sublease.

SEWERS FOR CHICAGO HOUSING AUTHORITY

(No. 12094—Commissioner of Water and Sewers—W. M. Z.—December 13, 1956.)

On October 31, 1956, we submitted to you our opinion which in part read as follows:

1. Do the provisions of the so-called Cooperation Agreement obligate the City of Chicago to provide and pay the cost of the additional sewer facilities needed to provide adequate sewer service to the Wentworth Gardens Housing Project?

May we call your attention to the Cooperation Agreement which is set out in the City Council Journal of January 20, 1950, as follows: * * * outstanding, whichever period is the longest, the City, without cost or charge, to the Local Authority or the tenants of such Project (other than the Payments in Lieu of Taxes) shall:

(a) furnish or cause to be furnished to the Local Authority and the tenants of such Project (I) the public services and facilities which are at the date hereof being furnished without cost or charge to other dwellings and inhabitants in the City, including but not limited to: educational, fire, police and health protection and services, maintenances and repair of public streets, roads, alleys, sidewalks, *sewer and water systems*; snow removal; garbage, trash and ash collection and disposal; street lighting on public streets and roads within such Project and on the boundaries thereof; and *adequate* sewer services for such Project; and (II) also such additional public services and facilities as may from time to time hereafter be furnished without cost or charge to other dwellings and inhabitants in the City; * * *'

- * * * *
7. If the City shall, within a reasonable time after written notice from the Authority, fail or refuse to furnish or cause to be furnished any of the services or facilities which it is obligated hereunder to furnish or cause to be furnished to the Local Authority or to any Project, then the Local Authority may proceed to obtain such services or facilities elsewhere, and deduct the cost therefor from any payments in lieu of taxes due or to become due to the City in respect to any Project or any other low-rent housing projects assisted or owned by the PHA. (Emphasis ours.)

We are of the opinion that it appears to be our duty to provide adequate sewer service from the above article of the contract."

However, since rendering the above Opinion, the following information has come to our attention, to-wit:

"The sewers serving the part of the Wentworth Gardens Project draining into the 2 foot sewer in Pershing Road were built as a part of the housing project at the expense of the Housing Authority, including the collecting sewer in Princeton Avenue, between 37th Street and Pershing Road. This Princeton Avenue sewer was built and connected to the 2 foot sewer in Pershing Road about 1945. This 2 foot sewer in Pershing Road discharges into the large intercepting sewer also in Pershing Road, but much deeper than the 2 foot sewer, through the 2½ foot sewer at Normal Avenue.

Prior to 1941, this large intercepting sewer, 20 feet in diameter, was operated by the Sanitary District of Chicago under an agreement ordinance between the City and the Sanitary District. After the construction of the pumping station at Pershing Road and Racine Avenue by the Sanitary District, and the abandonment of the pumping station at Pershing Road and Lake Michigan, this 20 foot sewer became a gravity main instead of a force main. Therefore, instead of flowing full and under pressure, it normally flowed somewhat less than one-half full. This made it much more convenient to make local connections than when it was flowing constantly under pressure. After the physical changes were made in the pumping stations and the 20 foot sewer, the Sanitary District delivered and the City accepted this 39th Street sewer on December 22, 1941, as shown in the Council Journal, page 6108-10.

At the time the housing project was being planned, including the sewers, the representatives of the Housing Authority discussed the sewers with the engineers of the Bureau of Sewers. They were advised concerning the two sewers in Pershing Road namely: the 2 foot

sewer at the high level and the 20 foot sewer lower down. They were also advised as to the fact that it would be much more expensive to make the connection to the 20 foot sewer at the lower depth. They decided that *because of the increased expense they would connect to the 2 foot sewer, because that effected an economy in the cost of the entire project, so the sewer plans were prepared accordingly, and approved by the Bureau of Sewers.*

The actual work of constructing the sewers for the housing project was done as a subcontract for the general project; the sewer contractor being a subcontractor to the plumbing contractor, who was a subcontractor to the general contractor. The work was done according to the plans and the housing project officials were aware of the physical conditions. The existing conditions were known to them, and the final conditions as built were their own choice. For these reasons, the Bureau of Sewers feels that the wording, 'Adequate sewer services for such Project; and also such additional public services and facilities as may from time to time hereafter be furnished without cost or charge to other dwellings and inhabitants in the City.' *does not apply to this particular case.* The additional services and facilities were there at the time the project was built. *The Housing Authority had the choice of connecting to the 2 foot sewer at a lower cost, or connecting to the 20 foot sewer at a much greater cost. Now they ask the City to pay the cost of making a connection to the 20 foot sewer, which at the time the project was being developed they were advised would give the superior service."*

It is our opinion that we have fulfilled our duty in this regard and therefore the Project should make arrangements to remedy any defect at their cost or expense.

It will not be necessary, therefore, to answer the second query submitted in your letter of October 9, 1936, with regard to costs of construction.

SECTION II
POLICE POWERS OF THE CITY

CHAPTER V—REGULATION OF PUBLIC HEALTH, SAFETY AND WELFARE

A. FOODS AND DAIRY PRODUCTS

ADVERTISING ON MILK CARTONS

(No. 11798—President, Board of Health—M. I. W.—March 29, 1954.)

In your letter dated March 11, 1954 you state that in recent years, certain milk companies have placed advertising matter and trade marks on milk cartons. Currently, an application has been made to market milk in cartons containing a picture of a pugilist who, it is claimed is president of the company vending such milk. You further state that there is no public health significance to the use of this type of label on the carton provided each carton contains all the information required by the ordinance. You request our opinion as to whether the Board of Health may legally permit such advertising on milk cartons.

You cite Section 154-11 of the Municipal Code of Chicago which reads as follows:

"All bottles, cans, packages, and other containers enclosing milk or any milk product, shall be plainly marked or labelled with the following and only such other information as may be designated by the Board of Health:"

This paragraph is followed in the code by an enumeration of types of information required including the name and description of the contents, the name and address of the producer or plant, the permit number and the date to be sold.

In an opinion of this office dated January 25, 1939, we stated that in our opinion, the Board of Health should approve the use of a cap containing the information required by Section 3090 of the Revised Chicago Code of 1931, as amended, and containing in addition the words "Dairy Pride" in relatively large letters around the upper portion of the outer edge of the cap. (The ordinance reads the same as present Section 154-11.) At that time we stated that the use of the words "Dairy Pride" could not be construed as a representation of any fact concerning the nature or quality of the milk itself and that the use thereof could not affect the public health.

If it was your intention to *disapprove* the labelling you describe in your letter, a serious question would exist as to the power of the board to enforce such disapproval of an action which admittedly poses no public health considerations. Since your inquiry indicates your intention to grant *approval* if legally permissible, we see no obstacle to the board taking such action.

CERTIFIED RAW MILK

(No. 11806—President Board of Health—M. I. W.—April 23, 1954.)

In a letter dated March 3, 1954, you state that you have received a request from a licensed chiropractic physician for permission to prescribe raw certified milk for his patients.

You request our opinion as to whether a licensed chiropractic physician may prescribe raw certified milk for his patients. You also ask whether certified raw milk can be sold without a prescription under our ordinances.

Section 154-14 of the Municipal Code of Chicago reads in part as follows:

"No milk shall be sold in the city except grade A pasteurized milk and milk products and certified milk and milk products. * * *

Certified milk and milk products shall conform with the rules and regulations of the board of health for certified milk and milk products."

A distinction is thus made between grade A pasteurized milk and certified milk, it being clear that these are two different types of milk which may be sold in Chicago.

The only other provision in the Code relating to certified milk is found in section 154-16 which sets a limit of time for sale of such milk after having been drawn from the cow.

We have found no provision governing the sale of certified milk in any state statute.

In the absence of any board of health regulation on this subject, (and none has been called to our attention), we find no authority for requiring a prescription from a physician for the sale of certified milk under the ordinance.

It is therefore unnecessary for us to consider the authority of a licensed chiropractic physician as distinguished from other medical practitioners to prescribe raw certified milk for their patients since this product is under the conditions discussed above, legally available to anyone.

FOOD DISPENSER'S LICENSE FOR COLLEGE CAFETERIA

(No. 11856—City Collector—M. I. W.—September 27, 1954.)

In your letter of September 16, you enclose a copy of a communication received from the Illinois Institute of Technology, under the date of September 13, which sets forth that said institution is a not for profit educational institution which maintains a cafeteria and dining halls for the exclusive use of its students and staff. It is claimed that the City Council never intended to subject organizations of this character to the license fees required by the ordinance.

Our opinion is requested as to whether the Illinois Institute of Technology is subject to the license fees involved, and if subject to such payment, the basis on which the fee is to be charged.

In an opinion directed to you, dated February 10, 1953, reported in Vol. 23 of the Opinions of the Corporation Counsel and Assistants at page 335, we had occasion to consider this identical question as it related to a dining hall and cafeteria maintained by North Park College. In that opinion (two copies of which we are enclosing), we held that the college was required to procure a food dispenser's license.

It is therefore clear that any action by way of creating an exemption for institutions of this character must come from the City Council.

FROZEN DESSERT PRODUCTS

(No. 11912—President, Board of Health—M. C. H.—June 14, 1955.)

This is to acknowledge receipt of your letter in which you inquire whether or not the Chicago Board of Health is legally required to enforce the provisions of Section 266, Chapter 56½ concerning the manufacture, sale and labeling of Frozen Dessert Products.

Please be advised that Section I, Chapter 56½ of the Illinois Revised Statutes which governs Pure Food Regulations, provides as follows:

"The Department of Agriculture shall enforce all laws that now exist or that hereafter may be enacted in this state regarding the production, manufacture, sale and labeling of food as herein defined, and shall prosecute or cause to be prosecuted any person, firm or corporation, or agent thereof, engaged in the manufacture or sale of any article manufactured or sold in violation of the provisions of any such law or laws."

Section 259 (K) of Chapter 56½ of the Illinois Revised Statutes defines the word "Department" as follows:

"'Department' means the Department of Agriculture which is charged with the enforcement of this Act."

It is our conclusion, in view of the above, that the enforcement of the Frozen Dessert Products Act is expressly committed to the Department of Agriculture under the provisions of said Act. However, it is good policy to report any violations of the Act, when found, to the Department of Agriculture of the State of Illinois.

REGULATE BAKERY TRUCKS

(No. 11938—City Collector—A. F. G.—August 19, 1955.)

In your letter of July 12, 1955, you call attention to a controversy which has arisen over the interpretation of the several provisions of Chapter 107 (Bakeries and Bakery Vehicles) having to do with vehicles used in the delivery of bakery goods manufactured by wholesale bakers. You request our opinion as to the applicability of these sections in situations where the vehicles are operated in connection with a wholesale bakery for the delivery of bakery products in the city, where such vehicles are not owned by such wholesale bakery but are hired or rented for the purpose of delivering bakery products.

The pertinent sections are in whole or part as follows:

"107-3. No person shall conduct or operate any bakery or engage in the business of an itinerant vender of bakery products at wholesale, without first having obtained a license for such bakery and for the vehicles operated in connection therewith, or for the vehicles operated in connection with said business of itinerant vender.

107-4. An application for a bakery license shall be made in conformity with the general requirements of this code relating to applications for licenses. In addition, the applicant shall state the number of vehicles used or to be used for the delivery of, and the number of persons engaged or to be engaged in the manufacture of, bakery goods.

The board of health shall make or cause to be made an examination of the place described in such application for the purpose of ascertaining whether the location, lighting, ventilation, sanitary arrangements, and equipment of such bakery conforms to the provisions of this chapter. The board of health shall also make or cause to be made an examination of the vehicles used or intended to be used for the delivery of bakery products, for the purpose of ascertaining whether the same conform to the provisions of this chapter.

107-5. The annual license fee for each wholesale bakery is hereby fixed at one hundred dollars for each establishment, and ten dollars in addition for each vehicle operated for the delivery of bakery products." The second paragraph of Section 107-18 reads as follows:

"107-18. All vehicles used for the transportation of bread and other bakery products shall be kept at all times in a clean and sanitary condition. The floors shall be cleaned daily and the walls, ceilings, bins, compartments, and delivery baskets shall be cleaned as often as necessary to keep them in a clean and wholesome condition. Drivers of bakery vehicles, attendants or other employees engaged in the delivery of bakery products, shall wear clean outer garments and clean washable gloves which shall be worn while handling such bakery products and for that purpose only."

Section 107-19 reads as follows:

"107-19. The board of health shall cause periodic inspections to be made of all bakeries and bakery vehicles.

Bakery vehicles shall be inspected under the direction of the board of health as often and at such times as said board may deem necessary or proper to keep them in a sanitary condition, and the inspectors shall make reports in writing to said board of health of any violation of this code in the operation of such vehicles or of any unsanitary or unclean conditions with respect to the transportation or delivery of bakery goods by such vehicles which may come to their attention."

A reading of the sections cited above shows clearly that it was the intention of the city council in enacting these provisions to protect the public health, by providing strict sanitary regulations for the operation of wholesale bakeries and over the vehicles used in the delivery of bakery products. The power of the city to enact these regulations is derived from Section 23-81 of the "Revised Cities and Villages Act" which grants power to municipalities.

"To do all acts and make all regulations, which may be necessary or expedient for the preservation of health or the suppression of disease."

You say:

"We have been of the opinion that regardless of whether the delivery vehicles are owned, hired or rented, Section 107-4 of the Municipal Code of Chicago, must be interpreted in accordance with the provisions thereof protecting the health and welfare of the public as embodied in the requirement for the inspection of the vehicles by the Board of Health. The said inspections of the bakery delivery vehicles are made for the purpose of determining whether such vehicles comply with the sanitary requirements as provided for by Sections 107-18 and 107-19.

Certain wholesale bakeries operating in this City have refused to accept our interpretation of Section 107-4 of the Municipal Code of Chicago. They allege and maintain that wholesale bakeries which do not own the vehicles operated for the purpose of delivery of bakery products are not subject to the provisions of Section 107-3 referring to vehicles operated in connection with the said bakeries. Their position has been that where common carriers and rented or hired vehicles are used by wholesale bakeries for the delivery of their products in the City such common carriers and rented or hired vehicles are not to be considered in connection with Section 107-3, nor are such vehicles to be considered in any way within the purview of any of the sections of Chapter 107 applicable to delivery vehicles used for the delivery of bakery products at wholesale."

We do not believe the position of these whoelsale bakers is tenable. The purpose of the ordinance is to provide clean and sanitary vehicles for the delivery of bakery goods. If only vehicles owned by the baker are subject to these requirements, and vehicles he may borrow or rent for the delivery of his products are not subject to any regulation of inspection, the purpose of the ordinance is defeated.

In construing a statute if the language is susceptible of more than one construction, the statute should receive the construction that will effect its purpose rather than defeat it. *Soofeld v. Board of Education*, 411 Ill. 11. In *People ex rel. Lipsky v. City of Chicago*, 403 Ill. 134 our Supreme Court said:

"In interpreting a statute, court must consider the legislative intent and purpose as expressed in the act, and then determine whether such intent have been sufficiently manifested by the statute, always keeping in mind the circumstances under which the act was passed and the purpose to be accomplished."

It is our opinion, therefore, that the provisions of Chapter 107 applicable to vehicles used in the delivery of bakery goods apply to vehicles rented for that purpose by a wholesale baker as well as to vehicles owned and used by him for the same purpose.

ALCOHOLIC INGREDIENT IN ICE CREAM

(No. 11988—President, Board of Health—M. C. H.—December 13, 1955.)

This is to acknowledge the receipt of your letter to this office dated December 1, 1955 in which our opinion is requested whether or not the manufacture of ice cream in which alcoholic spirits in the form of rum, cognac, and cherry cordial containing approximately one per cent of alcohol by weight or volume is permitted under the existing ordinance, whether it is to be given away as well as to the sale of the same in Chicago.

Please be advised that Chapter 56½, section 40(b) of the Illinois Revised Statutes, 1955, provides as follows:

"(b) Plain ice cream is frozen substance made from any mixture of milk products that will provide the desired ratio and concentration of milk solids (fat and milk-solids-not-fat) and sugar or dextrose or corn syrup or corn syrup solids or a combination thereof, and may contain harmless flavoring and coloring, edible gelatin, and eggs, and shall contain not less than twelve (12) per cent by weight of milk fat. The volume of ice cream after being melted and reduced to its volume while in the unfrozen and unwhipped states shall not be less than one-half ($\frac{1}{2}$) the volume of the ice cream as manufactured and sold by the manufacturer.

Special ice creams are those flavored by the addition of such materials as sound ripe fruits, fruit juices or fruit sirups, harmless flavoring and coloring, sound non-rancid nuts, spices, chocolate, cocoa or maple sirups, candy or confections. The mixture from which special ice creams are made shall contain not less than twelve (12) per cent milk fat in that portion excluding the flavoring materials, and the finished ice cream shall contain not less than ten (10) per cent milk fat."

It is safe to assume in view of the prescribed ingredients permitted by this statute to be put into the manufacture of ice cream that any other ingredient not above mentioned found in ice cream would be considered as a foreign substance. It is, therefore, our opinion that the presence of rum, cognac, cherry cordial put in as additional flavoring in the process of the manufacture of ice cream is a violation of the State statutes on foods.

SCALES MEASURING 1/100's OF A POUND

(No. 12037—City Sealer—W. J. K.—May 2, 1956.)

The following opinion is in regard to your recent communication stating that a scale has been put into use in Chicago for the weighing of pre-packaged meat and meat products, and that the scale does not weigh in terms of ounces, but, in substitution of ounces, it weighs in units of 1/100ths of a pound. Further, attached to said letter are two receipts, one of which shows that a cooked ham slice selling at \$.85 a pound and weighing 0.67 of a pound cost the purchaser of said commodity \$.57, and the other receipt showing that a meat product selling for \$.85 a pound and weighing 0.63 of a pound cost the purchaser \$.54. You make inquiry as to whether or not the use of said units of 1/100ths of a pound, in lieu of ounces, is illegal.

Under Section 23-68 of Chapter 24 of the Cities and Villages Act of the Illinois Revised Statutes of 1955, the City of Chicago received its power to regulate the sale by weight of "all grain, flour, meal, hay, feed, seeds, fruits, nuts, vegetables and non liquid vegetable products, meats and non liquid animal products, fish, butter, cheese and other similar dairy products, dry groceries and all other similar articles of merchandise, in the absence of a contract or agreement in writing to the contrary to be sold by standard avoirdupois weight or by numerical count."

Webster's Unabridged Dictionary defines avoirdupois weight as "a system in common use in English speaking countries for weighing all commodities, except precious stones, precious metals and drugs. In it 16 drams make one ounce, 16 ounces make one pound."

Pursuant to the power granted the City of Chicago, the City Council passed Section 100-12 of the Municipal Code of Chicago, which, in part, reads as follows:

"All vegetables, vegetable products, fruits, (except those described in Section 100-13), live and dressed poultry, poultry products, meats, meat products, non liquid animal products, fish products, butter, cheese and other similar dairy products except eggs, sold or offered for sale within the city for delivery within the city, except for immediate consumption upon the premises, shall, in the absence of a contract or agreement in writing to the contrary signed by both parties thereto, be sold by standard avoirdupois net weight; * * *."

It is to be noted that in Section 23-68 of Chapter 24 of the Cities and Villages Act of the Illinois Revised Statutes of 1955 and Section 100-12 of the Municipal Code of Chicago, it is stated that all meats, meat products etc. are to be sold by "*standard avoirdupois net weight* * * *". (Emphasis ours.) Therefore, it is our opinion that the use of any other measure of weight besides the standard avoirdupois net weight is illegal and is in violation of the ordinances of the City of Chicago.

ADULTERATED POULTRY—EXCESS WATER

(No. 12049—President, Board of Health—M. C. H.—June 21, 1956.)

This is to acknowledge your letter to this office in which inquiry is made whether or not a suit may be instituted against Carl Bauer, President of the Bauer Poultry Company, for the storage and keeping for sale of adulterated poultry under Sections 95-3 and 95-20 of the Municipal Code of Chicago.

Section 95-3 of the Municipal Code provides as follows:

"Impure or adulterated water, drugs, or food. No person shall keep, expose or offer for sale or exchange, or shall sell or deliver any drugs not conforming to the rules and standards of the United States pharmacopoeia, nor any water, liquids, or food which shall be impure, unwholesome, adulterated, or to which any harmful or injurious foreign substance has been added."

Section 95-20 of the Municipal Code provides as follows:

"No cased, blown, plaited, raised, stuffed, putrid, impure, unhealthy, or unwholesome meat, fish, bird, or fowl shall be held, bought, sold, or offered for sale for human food in any place in the city."

Chapter 56½, Section 8-4 of the Illinois Revised Statutes defines adulteration of food as follows:

"If it be mixed, colored, powdered, polished or stained in any manner whereby damage or inferiority is concealed or it is made to appear better or of greater value than it really is or if any substance has been added thereto or mixed or packed therewith *so as to increase its bulk or weight* or reduce its quality or strength or make it appear better or of greater value than it is." (Emphasis supplied.)

Section 402 (b) (1) of the Federal Food, Drug, and Cosmetic Act defines adulterated food as follows:

"If any valuable constituent has been in whole or in part omitted or abstracted therefrom; or (2) if any substance has been substituted wholly or in part therefor; or (3) if damage or inferiority has been concealed in any manner; or (4) if any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is."

It is our opinion that the presence of an undue amount of frozen water adhering to the fowl inside of plastic bags will increase the weight or bulk of the fowl and, therefore, constitutes a violation of Chapters 95-3 and 95-20 of the Municipal Code of the City of Chicago as well as a violation of Chapter 56½, Section 8-4 of the Illinois Revised Statutes on foods, and Section 402 (b) (1) of the Federal Food, Drug, and Cosmetic Act.

In view of the foregoing, it is safe to state that a suit may be properly instituted against Mr. Carl Bauer, President of the Bauer Poultry Company for the storage and keeping of adulterated poultry.

SCALES MEASURING 1/100's OF A POUND

(No. 12073—City Sealer—W. J. K.—August 31, 1956.)

On the 2nd day of May, 1956, I prepared an opinion regarding the use of a scale that weighs commodities in terms of units of a pound and, in lieu of ounces, substitutes therefor units of 1/100 of a pound. In that opinion I concluded that the use of any measure of weight other than the "standard avoirdupois net weight is illegal and is in violation of the ordinances of the City of Chicago.

Of recent date, you sent a letter to this office, which had attached thereto two letters from department heads of the National Bureau of Standards, Washington, D. C. In your letter you propound the question, would it be advisable to give further consideration to the opinion rendered on the 2nd day of May, 1956, based on the added information contained in said attached letters.

Mr. H. H. Russell, Chief, Scale Unit, Mass and Scale Section of the National Bureau of Standards, writes, "If commodities are weighed in units of the pound and the sub-units are 1/100 of a pound, may the result of such procedures be considered avoirdupois weight? On the assumption that the pound referred to in your question is the pound avoirdupois, any subdivision and any multiple of that pound would be an avoirdupois unit. It does not matter how the fraction or the multiple is expressed—the result will be a unit in the avoirdupois system". Further, in his letter Mr. Russell refers to a printed copy of NBS Circular 570 entitled, "Units and Systems of Weights and Measures—Their Origin, Development and Present Status" and specifically refers to Paragraph 2.4 of that periodical. This circular was submitted to me prior to your request for a reconsideration of the opinion, and I have since taken particular note of said Paragraph, which states, in part, as follows:

"Paragraph 2.4 * * * The method of subdivision of a unit is thus largely made on the *basis of convenience to the user*. The fact that units have commonly been subdivided into certain subunits for centuries does not preclude these units also having another mode of subdivision in some frequently used cases where convenience indicates the value of such other method. * * *

Therefore, I must conclude that the type of scale, which is the subject matter of this opinion, is an avoirdupois scale.

However, the legislature, under Paragraph 23-68 of Chapter 24 of the Cities and Villages Act of the Illinois Revised Statutes of 1955, at the time of enactment, used the words, "standard avoirdupois weight".

In the past, when purchasing commodities for home consumption, the public has been educated to use the pound and the ounce. Any weighing of such commodities should be such as to be understood when read by the average individual under customary conditions of a purchase.

Black's Law Dictionary, 4th Edition, defines the word "standard", as follows:

"Stability, general recognition, and conformity to established practice."

In the same publication, the phrase, "standard of weight or measure", is defined as follows:

"A weight or measure fixed and prescribed by law to which all other weights and measures are required to correspond."

Weighing and measuring commodities with the use of a subunit of 1/100 of a pound would not be "standard avoirdupois weight", in that according to the definition of the word, "standard", this subunit is not generally recognized and does not conform to established practice. The use of "standard avoirdupois weight", which the legislature had in mind when it enacted Paragraph 23-68 of the Cities and Villages Act, Chapter 24 of the Illinois Revised Statutes and which the City Council of Chicago had in mind when enacting Section 100-12 of the Municipal Code of Chicago, was the subunit of an ounce and not that of 1/100 of a pound.

Further, as is disclosed in the periodical heretofore referred to. Units and Systems of Weights and Measures, (Paragraph 2.4) the scale or subject matter of this opinion is made for the convenience of the user of the scale and not for the public.

It is my opinion that the use of a scale having units of 1/100 of a pound in lieu of ounces for the purpose of weighing and measuring commodities for sale to the public would be illegal because it does not weigh and measure in accordance with the generally recognized requirements as intended by law, that is "standard avoirdupois weight."

INSPECTION OF FROZEN MEAT SANDWICHES

(No. 12088—President, Board of Health—M. C. H.—November 19, 1956.)

This is to acknowledge your letter to this office and your request for an opinion as to whether Chapter 95-14 and 95-15 of the Municipal Code of Chicago pertaining to the purchase or sale of uninspected meat should be made applicable to the sale of frozen meat sandwich products in the City of Chicago. You further state that these products are packaged by the Diamond Commissary Company, establishment No. 1105, of Pasadena, California, a federally inspected plant. You also state that these products do not bear a federal stamp for the reason that the United States Department of Agriculture, Meat Inspection Branch, does not regard this type of product as being a meat food product, and, therefore, not amenable to the Federal Meat Inspection Act and Regulations if offered for sale in interstate commerce.

We are further advised that the Meat Inspection Branch of the United States Department of Agriculture, in a letter under date of October 5, 1956, directed to the applicant's attorneys, O'Keefe, O'Brien & Hanson, set forth a plan which would be put into force and effect by the Los Angeles Branch of the United States Department of Agriculture with reference to the products of the above applicant. A copy of this letter is attached hereto and in substance states that a letter would issue to the Chicago Board of Health from the Los Angeles Branch of said Department in conjunction with each shipment of the applicant's products directed into the City of Chicago. Such letter would give a detailed description of the shipment, including the number of boxes, the identities of the shipper and consignee and the markings, including serial numbers to be placed on each package of the applicant's products:

The letter would further state that the products had been prepared in an establishment operating under inspection by the United States Department of Agriculture and that the meat components, if shipped as meat and not as part of the sandwich would be identified as United States Government inspected and passed and so marked.

After due consideration of the above application, in light of the requirements of Chapter 95-14 and 95-15 of the Municipal Code of Chicago, it is the opinion of this office that the Chicago Board of Health in its discretion may exempt the products of the applicant from inspection by the City Meat Inspectors as prescribed by the provisions of Chapter 95-14 of the Municipal Code of Chicago and further that under the circumstances and conditions enumerated above the serial numbers placed on each package and specifically referred to in the accompanying letter from the Department of Agriculture would satisfy the marking requirements of Chapter 95-15 of the Municipal Code of Chicago.

B. WEAPONS

SALE OF WEAPONS

(No. 12195—Alderman, 14th Ward—R. N.—January 14, 1958.)

We have given serious consideration to your recent request that section 183-6 of the Municipal Code of Chicago be revised so as to preclude the possibility of circumventing its provisions. As it now reads, the requirement for a permit to purchase a deadly weapon in Chicago "shall not apply to sales made of such articles which are to be delivered or

furnished outside the city". You state that sales are made in Chicago for use outside the city but the weapons so purchased are then returned through subterfuge to Chicago residents.

The jurisdiction of the City in regard to weapons is limited to the corporate limits of the city, and no extension of operation beyond those limits can be accomplished by legislation. For this reason, as well as for the reason that local legislation may not so operate as to interfere with interstate commerce, the language above quoted is included in section 183-6. Thus purchases within the jurisdiction may be regulated by any reasonable means, but even outright purchases beyond the city limits for use within the city are beyond the regulatory authority of the City.

The second amendment to the Constitution of the United States states "the right of the people to keep and bear arms shall not be infringed". The statutes of the State of Illinois by "An Act relating to deadly weapons" (Chap. 38, secs. 152-158b) regulates the sale, possession and carrying of deadly weapons. The only prohibition against the carrying of firearms is that they not be concealed on or about the person or, under specified conditions (section 155 a), in a motor vehicle.

Dealing in such weapons is regulated, possession by certain persons is prohibited, and by section 158 it is specifically provided that "The provisions of the Act shall never be construed as depriving any citizen of the right to keep in his home or place of business, any firearm reasonably necessary for the protection thereof". The Chicago ordinance (Chapter 183 of the Municipal Code of Chicago) is patterned along the lines of the statute. Sales within the corporate limits are regulated and permits to purchase are required. No mention is made either in the statute or the ordinance of the acquisition of firearms by any means other than purchase. No restrictions are imposed upon mere possession.

We can see no way in which the City by ordinance can regulate the sale of weapons to be delivered outside the city ostensibly for use outside the city but actually re-sent into the city to avoid the permit requirement for purchases within the city. However, if it can be established by evidence that the two transactions actually are to accomplish this purpose, in our opinion such a procedure would constitute one transaction and a violation of present provisions, and a prosecution could be maintained for the violation. This would, however, be a matter of evidence and administration, and not of legislation.

TOY GUN NOT A "FIREARM"

(No. 12319—Acting Commissioner of Police—J. C. M.—February 3, 1960.)

In your letter dated January 13, 1960, you request an opinion as to whether a toy gun received from the 35th District, which is manufactured by Mattel, Inc., Los Angeles, California, comes within the provisions of Paragraph 153-155 of Chapter 38, Illinois Revised Statutes, 1959.

We have examined the gun and the cartridge to be used therein. We have received and examined an affidavit from the executive vice president of Mattel, Inc. explaining the manufacture, design and operation of the toy gun, which affidavit advises:

"This toy-buckle gun is not a toy firearm in which any explosive substance can be used. It operates as follows: The trigger releases a light spring hammer which makes contact with a toy spring loaded cartridge. The cartridge is then pushed forward and the light plastic

toy pellet is released from the cartridge. The velocity of the release is so low that the toy plastic pellet is harmless on contact with a live target."

Paragraphs 152 to 158b of Chapter 38 relate to "Deadly Weapons" and the weapons are enumerated in paragraphs 152 and 153. Toy guns are not mentioned. Paragraph 155 provides, *inter alia*:—"No person shall carry concealed on or about his person, a pistol, revolver or other firearm".

"The common meaning of the word 'firearm' is a weapon which *acts by the force of gun powder*". (Webster's Dictionary, 40 Cyc. 852.)

In considering an ordinance similar to Section 183-10, which defines "Air Rifles and Toy Weapons" and makes it unlawful for any person to " * * * sell or give away any air rifle or air gun, or any toy firearms or other toy in the nature of a firearm in which any explosive substance can be used without securing a license so to do", etc., the court in *Cada v. The Fair*, 187 Ill. App. 111, in adopting the definition of firearm as above set forth, said:

"No doubt this is the meaning in which the word 'firearm' is used in the phrase 'gun, pistol, or other firearm'".

Immediately following that phrase, however, is another clause, viz:—"or any toy gun, a toy pistol, or other toy firearm, in which any explosive substance can be used." In this clause, the words, "gun", "pistol", and "firearm" are each qualified by the word "toy". A toy is a "plaything for children". (Webster's Dictionary.) Manifestly, a "firearm" designed to be a plaything for children must be something different from a real "weapon which acts by the force of gun powder". The natural meaning of a "toy firearm" is a child's plaything resembling a firearm in some respects.

The ordinance does not forbid the sale of all toy firearms, however. It only prescribes the sale of "toy firearms in which an explosive substance can be used."

In the report of the commanding officer, 35th District, to you, dated January 12, 1960, it appears that a child pupil at the Jenner School discharged a 32 caliber bullet from this type of toy gun. In discharging the pellet, the gun's barrel was split open and the cartridge exploded. Further investigation by the school authorities led to the recovery of six more toy pistols of the same make. The report states:

"In order to fire a 32 caliber bullet, parts of the pistol have to be removed. The six toy pistols which were recovered had these parts missing."

From data submitted by the manufacturer, it appears that tests were made in March, 1959 to insure the safety of the Toy Buckle Gun, prior to putting it on the market. In October, 1959, tests were made as to the possibility of a bullet being discharged from the pistol. The design of the toy gun would have to be changed to accomplish such action.

It will be noted as to the six guns confiscated at the Jenner School, parts of the guns were removed from their original manufacture. In the report of the commanding officer, it appears:—"In order to fire a 32 caliber bullet, parts of the pistol have to be removed."

In determining the applicability of a regulatory statute or ordinance, we must apply it to the instruments as manufactured and marketed. From an examination of the toy pistol, so manufactured and marketed, in our opinion, neither the statute nor the ordinance has any application. No explosive substance can be used. No bullet can be used without removing parts. It is not a "firearm" as defined by law.

C. GAMBLING AND LOTTERIES

"TRADE STIMULATOR"

(No. 12008—Commissioner of Police—W. J. K.—February 2, 1956.)

Your request for an opinion as to the validity and legality of a promotional sales plan known as "Trade Stimulator" with a letter and exhibits attached thereto from counsel who represent the Turn-Over Premium Co. has been received by this office. The letter explains in detail the operation of the promotional scheme. The exhibits attached are photographs of a "Turn-Over" device and of printed coupons of different denominations, said coupons denoting the face value thereon.

It appears that the Turn-Over Premium Co. would sell the "Trade Stimulator" system or sales promotional scheme to retail outlets or merchants for a consideration, in order to promote the business of the particular retailer desiring to increase its sales. The best explanation may be had by quoting portions of the letter submitted, to-wit:

"The operation of the system is—my client sells printed redeemable coupons, each in the face value of one tenth of one cent, and other denoted values. Said coupons are sold to the merchants desiring to use the trade stimulator system for face value. Each dealer, whether he be a gas station operator, restaurant owner, shoe store owner, or any other type of business owner, will give out one-unit coupons to each purchaser for each minimum sale. For no further consideration, the customer may, if he desires, flip the Turn-Over mechanism and device, which device is a simple lucite transparent box containing 21 marbles, divided into 4 colors, 9 red marbles, 5 green marbles, 4 white marbles and 3 black marbles. All the marbles are within an enclosure in the transparent box and roll around freely in the enclosure. Close to each end of the enclosure is a compartment which receives 3 marbles. The entire lucite box is attached to a stand, the box standing in an upright position. With a flip of the finger the box is turned over and the marbles roll or fall to the opposite side. The compartment on the opposite side catches 3 marbles. If the 3 marbles fall into any of the following formations the customer receives extra coupons for premiums. The following are the formations and the number of extra coupons received therefor:

"Three red marbles—3 coupons.

Two red marbles and one black marble—5 coupons.

Three green marbles—8 coupons.

Two green marbles and one black marble—10 coupons.

Two white marbles and one black marble—12 coupons.

Three white marbles—15 coupons.

Three black marbles—100 coupons.

"In view of the fact there is no consideration whatsoever, there is no chance for the customer to lose at all.

"The next customer then turns the box over, with a flip of the finger and the marbles again roll freely.

"Two things are important to note. 1. Every customer is entitled to 1 coupon from any business using the trade stimulator. 2. No

customer pays for said coupon or coupons, but every customer is entitled to an opportunity to receive more coupons by the Turn-Over trade stimulator.

"* * *

"The Turn-Over device tends to benefit business in that customers will tend to buy as much as possible to have the opportunity to get more coupons so they can get premium goods at a reduction of the market price.

"There is no discrimination between one customer and another and no one can predetermine in what color formation the marbles will fall into the compartment on each turn over."

The letter further states that a catalog is furnished to the merchant or retailer showing all premium goods available to holders of the coupons, and any customer, who has accumulated the proper number of coupons, plus a certain amount of cash, may purchase merchandise itemized in said catalog; for example, a \$54.00 bicycle may be had by any person who has accumulated 1000 coupon units and \$20.00 in cash.

By the facts submitted, our problem is to determine whether or not this promotional sales scheme is a lottery or gift enterprise and comes within the purview of the Illinois lottery laws and the ordinances of the City of Chicago.

Under our State Constitution, Section 27, Article IV, it is provided that the General Assembly shall have no power to authorize lotteries or gift enterprises for any purpose and shall pass laws to prohibit the sale of lottery or gift enterprises in this state.

By authority granted to the City of Chicago by the Cities and Villages Act, Section 23-57 of Chapter 24 of the Ill. Rev. Stats. of 1955 * * * an expressed grant of power "to suppress gaming, gambling houses, lotteries and all fraudulent devices or practices for the purpose of gaining money or property". The power thus conferred, our City Fathers enacted Chapter 191 of the Municipal Code of Chicago, which prohibits gambling, lotteries and policy games.

Further, the state legislature, pursuant to Section 27, Article IV of the Illinois Constitution of 1870, enacted paragraphs 408, 409 and 411 of the Criminal Code, Chapter 38 of the Ill. Rev. Stats. of 1953, all of which said paragraphs enumerated relate to gaming and lottery.

In the case of *Dunn v. People*, 40 Ill. 465 (1866), our Supreme Court said that the word, "lottery", has no technical meaning in the law, distinct from its popular signification, which is a scheme for the distribution of prizes by chance. In another case, *People v. Monroe*, 349 Ill. 270 (1932), our Supreme Court used Webster's definition—"a scheme for the distribution of prizes by lot or chance".

The leading case in the State of Illinois, *Iris Amusement Corp. v. Kelly*, 366 Ill. 256 (1937), where a prize money distribution scheme of motion picture theatres known as "Bank Night" was under consideration, the Court held that this scheme was a lottery and violated the ordinances of the City of Chicago. The Court defined a lottery as a scheme for the distribution of prizes by lot or chance, and that it consists of three essential elements—(1) the price, (2) the chance and (3) the prize. The Court, in concluding (p. 268), said:

"Our public policy against lotteries expressed in two constitutions, in the criminal code, and in the ordinance before us, is much too firmly rooted to be evaded by any chimerical device. Our conclusion is that the operation of the scheme outlined in the amended complaint constitutes a lottery, and that the plaintiffs have no standing in a court of equity for its furtherance or protection."

Answering those portions of the letter, " * * * there is no consideration whatsoever, there is no chance for the customer to lose at all. * * * Two things are important to note. 1. Every customer is entitled to one coupon from any business using the trade stimulator. 2. No customer pays for said coupon or coupons, but every customer is entitled to an opportunity to receive more coupons by the 'Turn-Over Trade Stimulator', the element of chance is present because of the opportunity to use the "Turn-Over" device, wherein certain combinations of the marbles entitle a customer to a certain number of coupons, and another customer will probably receive the same number or a different number of coupons, depending upon the combination of the marbles. It is very obvious from studying the possible combinations of marbles to be trapped how many hundreds, probably thousand, of customers will fail to get the required combination in order to obtain additional coupons. With the present set up of twenty-one marbles there are approximately thirteen hundred losing combinations, so that the customer is taking a chance as to whether or not he will receive additional coupons. In 17 Ruling Case Law, p. 1225, Section 12 of the article on lotteries, the subject matter relating to lotteries, it is stated:

" * * * from an examination of the later cases, both federal and state, it appears to have become the established American doctrine that, in order to constitute a lottery within the meaning of the various statutes, it is not necessary for the distribution of prizes to be purely by chance, but only for such distribution to be by chance as the dominating elements, * * *"

The next element, or the prize, is prevalent by the furnishing of the premium catalog.

As to the price, our Supreme Court has held that the price is hidden in the purchase of the commodity. In the *Iris Amusement Corp.* case, it was held that in the conducting of a scheme called "Bank Night", the price was hidden in the payment of the admission, to-wit:

"In this scheme there is present every element of the evils attendant upon mass gambling. A small stake concealed within the price of admission gives its chance for a large prize, * * *"

The practical aspect of the subject matter before us has been considered as to whether a lottery exists by applying the facts and the results obtained therefrom.

In view of the foregoing, it is our opinion that this sales promotional scheme or enterprise entitled "Turn-Over Trade Stimulator" contains each and every element of a lottery or gift enterprise and is against public policy as expressed in our State Constitution, the Criminal Code of the State of Illinois and the ordinances of the City of Chicago.

"BOND NIGHT DRAWINGS"

(No. 12079—Commissioner of Police—A. F. G.—September 28, 1956.)

With your letter of September 18, 1956 you enclosed a communication from the Acting Captain Commanding 40th District requesting an opinion as to the legality of "Bond Night Drawings", currently being held in various taverns in that district. The Illinois Liquor Dealers Protective Association is an Illinois corporation with a membership of from 2500 to 3000 in the State, 800 of which are in the city of Chicago. The Association has 45 Locals in the State, 14 of which are in Chicago. Members of the Association pay monthly dues of \$3.00 to their Locals, half of which goes to the State office.

The operation of the "Bond Night Drawing" is explained by the Acting Captain as follows:

"14-members of Local 10, formed a Bond Night Club, in February of 1955, under the guidance of officers of local No. 10, which was started as a business stimulator wherein each member puts up \$5.00 each week in the central pool, for the purpose of buying U. S. War Bonds, which are furnished by the Local to be given to registered customers whose names are drawn from a master receptacle.

To qualify a customer fills out a permanent registration card in his favorite Tavern, for which there is no charge with no need to make a purchase. The only requirement is that the customer's name that is drawn must be at the Tavern that he is registered from at the time of the drawing. If he is not present bond is added to next weeks drawing.

Drawings are conducted on Tuesday evenings at 8:30 P.M. and again at 10:30 P.M. and drawings are held at a different member's tavern each week.

Customers are allowed only one card and this card is a permanent registration and is kept in the Central or Master receptacle.

Since the inception of this Bond Night Club, the Local has received \$6,955.00 from its members, of which \$4,312.00 has been used for the purchase of War Bonds, with \$283.00 paid out for printing.

At the various drawings, the Committee attends such drawings and while therein they purchase a round or two of drinks for the customers and to date they have spent a total of \$1,845.00 in the above manner, leaving a total of \$449.00 in the central pool.

Officers of Local No. 10, were instructed to refrain from conducting future Bond Night Drawings, until such time as a legal opinion is obtained as to its legality."

The only persons permitted to participate in the drawing are customers of the tavern who secure registration cards as such from the owner of the tavern. Customers become such by reason of the fact that they make purchases or have dealings with the tavern owner. Webster defines "customer" as "one who regularly, customarily or repeatedly make purchases of or has dealings with, a tradesman or business establishment; a buyer or purchaser; a patron."

A lottery is prohibited by the Constitution, the Criminal Code and the ordinances of the City. It is a scheme for the distribution of prizes by lot or chance, a scheme which consists of three essential parts or elements—i.e., (1) a chance, (2) for a prize, (3) for a price.

In the instant case all three elements are present. The customer pays the price by reason of purchases he has made which made him a customer, the War Bonds are the prize, the drawing constitutes the chance.

In *Iris Amusement Corporation v. Kelly*, 366 Ill. 256, (1937), a prize money distribution scheme of motion picture theatres known as "Bank Night", was examined and held to constitute a lottery and to violate the City ordinance, notwithstanding that persons not attending the theatre and who never paid an admission fee had a chance to win. The Court, however, held that a scheme does not cease to be a lottery because some or even many do not have to pay to participate, saying (p. 266):

"In actual operation those who paid to get in, paid for those on the outside in so far as those on the outside had a chance to win, and the giving of free chances to those who did not come in could not alter the basic and essential character of the transaction. * * *"

In the scheme of tavern owners for the operation of "Bond Nights" only customers can participate, and they pay a price to become customers.

In our opinion the scheme is a lottery and conducted in violation of law.

AUTOMOBILE USED IN CONNECTION WITH GAMBLING

(No. 12193—Commissioner of Police—J. C. M.—December 17, 1957.)

On December 11, 1957 you wrote and advised that Agents Wilson and Tobias of the United States Internal Revenue Department requested the cooperation of the Chicago Police Department in confiscating motor vehicles used in violation of the United States Code covering Wagering Stamp Laws. The plan was that your office notify them when violations were found and violators were placed under arrest, so that their agent could confiscate the motor vehicle. The arresting officer would be required to furnish them with an affidavit setting forth the violation.

Section 7302 of the Internal Revenue Act of 1954 provides:

"It shall be unlawful to have or possess any property intended for use in violating the provisions of the Internal Revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property."

The section further provides that the seizure and forfeiture of any property thereunder "shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds for violation of the Internal Revenue laws." These forfeiture provisions are applicable to the use of a automobile in a gambling business without payment of the special gambling tax (*U. S. v. 1 1953 Olds. sedan*, 132 F. Supp. 14). Under the statute, any automobile being illegally used in connection with gambling business where the operator of such business has not paid under the Stamp Law becomes contraband. This is particularly true because the statute says "no property rights shall exist in any such property."

Our principal concern is the language that will be used in the receipt to be given to the Police Department by the federal agents in taking possession of any automobile that has been seized by the Chicago Police Department. If the receipt states that the possession of the property, being an automobile or otherwise, is being taken by the agents of the Internal Revenue Service of the United States, under Section 7302 of the Internal Revenue Act and signed by such agents, we are of the opinion that proper protection is given to the Chicago Police Department.

Compliance with the above suggestions would justify your department to give complete cooperation to the agents of the Internal Revenue Department, as requested in the letter of John J. Murphy, Chief Intelligence Division, United States Treasury Department, Internal Revenue Service, dated December 3, 1957 and the discussions had with Agents Wilson and Tobias of that department in your office on December 11, 1957 as set forth in your letter of December 11, 1957.

THEATRE PROMOTIONAL SCHEME

(No. 12241—Commissioner of Police—W. J. K.—July 18, 1958.)

Your request for an opinion upon inquiry from Attorney Elmer R. Segal, regarding a promotional scheme in connection with the operation of a motion picture theater in the City of Chicago, wherein he states, "my client who owns and operates a motion picture theater, is desirous as a promotional method, of having the management buy certain items of merchandise

from such persons in the audience as shall have them for sale. There would be no advance advertising as to what merchandise the management would be willing to purchase. For example, the management may announce that it will offer \$2.00 to any person in the audience who will sell to the management a red pocket comb or a blue ball pen." The question that arises is whether this promotional scheme is in violation of lottery or gift enterprise laws.

Our State Constitution under Section 27, Article IV, provides:

"That our general assembly shall have no power to authorize lotteries or gift enterprises for any purpose * * *"

As a result thereof, paragraph 406 of Chapter 38 of the Criminal Code of the Illinois Revised Statutes of 1957, our State Legislature enacted a law making it a criminal offense to set up or promote any lottery for money or by way of lottery to dispose of anything of value. Further paragraph 407 of the same chapter makes it unlawful for the owner or occupant of every house or building who knowingly permits the setting up, managing or draw of a lottery, or knowingly suffers money or other property to be raffled for, or to be won, by any game of chance.

Under paragraph 23-27 of Chapter 24 of the Revised Cities and Villages Act of the Illinois Revised Statutes of 1957, an express grant of power was given to municipalities "to suppress gambling, gambling houses, lotteries and all fraudulent devices or practices for purposes of gaining money or property." By virtue of this express grant of power the City Council passed Section 191 of the Municipal Code of Chicago, prohibiting gambling, lottery and policy games. The City Council further enacted Section 104 of said City Code pertaining to amusements specifically therein, 104.1-16, which provides as follows: "It is unlawful for any licensee to conduct or permit any person to conduct any raffle, lottery or chance distribution of money or article of value or any gift enterprise or any form of gambling upon the licensed premises."

Further under Section 104.1-19 the revocation of an amusement license by the Mayor is possible for violation of any provisions of the Municipal Code or the laws of the State of Illinois, applicable to the licensee or the licensed premises.

The announcement by the management from the stage of the theater that it will buy certain items of "merchandise" from such persons in the audience as shall have them for sale, means that the management would announce that it would purchase from persons in its audience "articles" (and not merchandise) that they may have on their persons or in their possession and would purchase them at a premium. The ultimate result of this is that of all the people present which may be many in number, only a comparable few have the chance to win a cash prize awarded by the management.

Our courts have ruled in many cases involving the lottery schemes and gift enterprises. In *People v. Monroe*, 349 Ill. 270, the court in this case accepted Webster's definition which defines a lottery as a scheme for the distribution of prizes by lot or chance. As far back as 1866 our Supreme Court ruled in *Dunn v. People*, 40 Ill. 465, by stating that the word "lottery" has no technical meaning in the law distinct from its popular significance which is a scheme for the distribution of prizes by chance. The leading case in the State of Illinois is *Iris Amusement Corporation v. Kelly*, 366 Ill. 256 (1937); wherein the court stated that a lottery may be defined as a scheme for the distribution of prizes by a lot or chance and that a lottery consists of three essential elements,—a chance, a prize and a price. This case involved "Bank Night" a promotional scheme undertaken by motion picture theaters wherein cash was distributed to patrons or customers who were in attendance.

Upon the announcement by the management that a certain article would bring the holder thereof a premium price, this is covered by the chance element; the premium paid for the same is the prize and the price to participate in this promotional venture is hidden in the purchase of the ticket or price

of admission even though no additional charge is imposed for the privilege of participation.

This promotional scheme has all the essential elements, price, chance and prize and is a subterfuge to circumvent the prohibitions of the Constitution of the State of Illinois, the laws of the State of Illinois and the ordinances of the City of Chicago and is a lottery or a gift enterprise, the operation of which would eventually result in the revocation of the amusement license.

"FREE PLAY" JUKE BOX

(No. 12248—P. P.—W. J. K.—August 20, 1958.)

Your request for an opinion as to whether or not "coin operated automatic phonograph machines * * * referred to as juke boxes * * * into which a buyer of musical renditions may insert a 50¢ coin, which will then pass through an electronic circuit and will entitle the purchaser to a minimum of seven records, the established price, or may give the buyer additional 'free plays', up to and not more than fourteen musical renditions." Wherein, your "client has developed a device which is attached to such coin operated automatic phonograph machine," constitutes gambling within the purview of the ordinances of the City of Chicago?

The proposed promotional sales scheme of your client, by attaching said device to a coin operated automatic phonograph machine, "juke box", is a lottery or gift enterprise, and is in violation of section 27 of Article IV of the Illinois State Constitution, the statutes of the State of Illinois, and the ordinances of the City of Chicago. This scheme contains all three elements which constitute a lottery; that is, (1) the price, (2) the chance, and (3) the prize; and is nothing but a subterfuge to circumvent the aforesaid laws.

D. OTHER HEALTH AND WELFARE REGULATIONS

FLASHING LIGHT ON MOBILE X-RAY UNIT

(No. 11819—Executive Director, Tuberculosis Institute—A. F. G.—May 19, 1954.)

In your letter of May 6, 1954 you state that you operate a fleet of mobile chest x-ray units in the largest tuberculosis chest x-ray program in the country. As a means of attracting the attention of passers-by to these buses as they are parked in the community neighborhoods during the summer months in the chest x-ray drives, you planned on installing on the roof of each unit a blue and white flashing light.

You inquire if there is any ordinance of the City prohibiting the use of blue and white flashing lights.

The lighting equipment of motor vehicles operated on the highways of this state is regulated by State law and not by city ordinances. The State law

is known as the "Uniform Act Regulating Traffic on Highways." Section 25 of this Act reads as follows:

"The provisions of this Act shall be applicable and uniform throughout this State and in all political subdivisions and municipalities therein, and no local authority shall enact or enforce any ordinance, rule or regulation in conflict with the provisions of this Act, unless expressly authorized herein."

Section 113 of the State Act, entitled Special restrictions on lamps, is as follows:

"Section 113. (a) No person shall drive or move any vehicle or equipment upon any highway with any lamp or device thereon displaying a red light visible from directly in front thereof.

(b) Flashing lights are prohibited on motor vehicles, except as a means for indicating a right or left turn or stop.

The provisions of Paragraphs (a) and (b) of this section shall not apply to authorized emergency vehicles or to vehicles of the second division designed for towing or hoisting disabled vehicles or equipment of contractors while engaged in maintenance or construction operations within the limits of construction projects."

The term "Authorized emergency vehicle" is defined in Section 2 of the Uniform State Act as

"Police vehicles, vehicles of the fire department and ambulances and in cities of 500,000 or more, emergency vehicles of municipal departments or public service corporations as are designated or authorized by proper local authorities."

The term is similarly defined in Section 27-1 of the Traffic Regulations of the City Code.

We do not believe the vehicles of your organization come within the definition of "Authorized emergency vehicle" and hence would be subject to the prohibition against flasher lights on motor vehicles provided in Section 113 quoted above. It will be noted that this prohibition against flasher lights is general and is not limited to lights of any particular color.

By Section 110 of the Uniform Act blue flasher lights may be permitted but is limited "exclusively for use by volunteer firemen, paid firemen, part paid firemen, or call firemen while responding to a fire call and on motorized equipment designed and used for removal of snow and ice from highways and owned and operated by the State of Illinois or any political subdivision thereof." Again we do not believe this permitted use would apply to your vehicles.

It is our opinion, therefore, in view of the foregoing provisions, that the installation and operation of blue and white flashing lights or flashing lights of any color on your x-ray units would be in violation of the "Uniform Act Regulating Traffic on Highways."

A simple amendment to Section 113 of the Uniform Act would remove this disability. In view of the useful work your organization is doing in the field of tuberculosis control, we feel sure the Legislature would not hesitate to enact such an amendment. The General Assembly does not meet until next January. If you feel that you would like to have such an amendment introduced at that time, we will be pleased to prepare such a bill.

SPARKLERS

(No. 11825—Alderman, 35th Ward—M. I. W.—June 7, 1954.)

In your letter of May 29, you request our opinion as to whether so-called "sparklers" may be legally sold in the City of Chicago.

Section 125-28 of the Municipal Code of Chicago makes it unlawful for any person to sell fireworks within the City of Chicago.

The term "fireworks" is defined in section 125-27 of the code and is followed by a proviso reading as follows:

"* * * provided however, that the term 'fireworks' shall not include sparklers * * *"

Therefore, under city ordinances, the sale of sparklers would be permissible.

This situation has, however, changed by action taken by the state legislature in 1953. Prior to that time, "fireworks," the sale of which was prohibited by the statute was defined as follows:

"The term fireworks shall mean and include any explosive composition, or any substance or combination of substances, or article prepared for the purpose of producing an audible effect by explosion, deflagration of detonation, and shall include blank cartridges, toy cannons, in which explosives are used, the type of balloons which require fire underneath to propel the same, firecrackers, torpedoes, skyrockets, Roman candles, bombs or other fireworks of like construction and any fireworks containing any explosive compound, or any tablets or other device containing any explosive substance; provided however, that *the term 'fireworks' shall not include sparklers*, toy pistols, toy canes, toy guns, or other devices in which paper caps containing twenty-five hundredths grains or less of explosive compound are used, providing they are so constructed that the hand cannot come in contact with the cap when in place for the explosion * * * " Chap. 38, par. 276.27 Ill. Rev. Stat. (1951) (emphasis added).

In 1953 the legislature enacted a bill which amended the section quoted above to read as follows:

"The term fireworks shall mean and include any explosive composition, or any substance or combination of substances, or article prepared for the purpose of producing an audible effect by explosion, deflagration or detonation, *or for the purpose of producing visual effects*, and shall include blank cartridges, toy cannons, in which explosives are used, the type of balloons which require fire underneath to propel the same, firecrackers, torpedoes, skyrockets, Roman candles, bombs or other fireworks of like construction and any fireworks containing any explosive compound, or any tablets or other device containing any explosive substance, *or containing combustible substances producing visual effects*: provided, however, that the term 'fireworks' shall not include toy pistols, toy canes, toy guns, or other devices in which paper caps containing * * * ." (The section continues in language unchanged from that quoted above.) Chap. 38, par. 276.27, Ill. Rev. Stat. (1953).

There are two significant changes related to the problem considered here. The word "sparklers" is now omitted from the list of those articles which are not deemed as included in the term "fireworks."

Not only did the legislature delete what was an express exemption of sparklers from the prohibition governing fireworks, but the italicized por-

tions of the section quoted above represent language which broadened the definition of "fireworks", previously framed in terms of articles prepared for the purpose of producing audible effects, to include those designed to produce visual effects.

"Sparklers" being devices containing combustible substances prepared for producing a visual effect when ignited fall directly within the prohibition of the statute as amended.

It is, therefore, our opinion that the sale of sparklers is prohibited in Illinois. We would recommend that the language of section 125-27 of the Municipal Code be amended to coincide with the statute and stand ready to prepare an ordinance to that effect at your request.

INSURANCE FOR PUBLIC VEHICLES

(No. 11835—Public Vehicle License Commissioner—P. D.—July 21, 1954.)

In a meeting which we had on July 12, 1954, you inquired into the proper method of enforcing the insurance provisions of Public Passenger Vehicle Ordinance (Chap. 28 Municipal Code) as they apply to associations, corporations and other organizations which render services and advertise on independent taxicabs.

A basic consideration of the Public Passenger Vehicle Ordinance is to afford the public assurance of a remedy and financial responsibility for damage or injury caused by the operation of a taxicab.

Section 28-2 and 28-23 permit service associations and corporations to advertise on member taxicabs only if those associations and corporations assume equal liability with their individual members. This requirement applying to both personal injuries and property damage is unequivocal and without limit. A member of the public injured or damaged due to the negligent operation of a taxicab owned by a member of an association whose name appears on the cab, must have a remedy against the taxicab owner individually, the association individually, or both jointly in order that the provisions of the Public Passenger Vehicle Ordinance be fulfilled. Proper administration of these sections requires that you have filed in your office a consent or assumption of liability by the various associations and corporations covering each of their members.

Chapter 28 not only guarantees a remedy against service associations and corporations advertising on a public passenger vehicle, but also requires that such organizations assure the public of financial responsibility. By specific reference the insurance provisions of Section 28-12 must be met by these associations and corporations. This is not to say that the limits of insurance on one particular taxicab are doubled because that taxicab owner is a member of an association. However, any insurance must clearly show that it covers the assumed liability of the association or corporation to the end that payment thereunder will not be refused because the association or corporation did not own or operate the cab in the regular course of business.

You also made inquiry at our meeting of July 12 as to the limits of insurance for vehicles with seating capacity of more than seven persons. Section 28-12 provides that each vehicle having a seating capacity of more than seven adult passengers must be insured for injuries to and death of more than one person in any one accident of at least \$100,000 plus \$5,000 more for each additional passenger capacity over seven. As an illustration a vehicle with seating capacity for 10 persons must be insured for \$115,000 for injury to more than one person in any one accident.

LICENSE FOR LIQUIDATION SALE

(No. 11838—City Clerk—A. F. G.—August 5, 1954.)

Your letter of July 26, 1954, reads as follows:

"Will you kindly advise me concerning the necessity for a license for a 'liquidation sale' under Chapter 121½ Paragraph 149, etc. of the Illinois Statutes for the Chicago-Laramie Motors located at 5157 W. Chicago Avenue.

The company sought to insert in the Sun Times an advertisement of a 'liquidation sale' to be held by them and were refused because they had not procured a license for such a sale.

I am somewhat puzzled by the position taken by the Sun Times for the reason that the Chicago-Laramie Motors are regularly established as motor vehicle dealers.

If the State law requires the Chicago-Laramie Motors to secure a special license for the "Liquidation Sale", does such a requirement also apply to similar sales conducted throughout the city by all automobile dealers?"

The Act referred to is entitled "An Act to prevent the fraudulent sale, and to regulate the sale, and to regulate the representation and advertising of, goods, wares, or merchandise, and to provide penalties for the violation hereof" approved July 6, 1933.

Section 1 of that Act is as follows:

"No person shall advertise, represent or hold out that any sale of goods, wares or merchandise is an insurance salvage, removal, closing out, going out of business, liquidation, or creditors' sale, or a sale of goods, wares or merchandise damaged by fire, smoke, water, or otherwise damaged, unless he shall have first obtained a license to conduct such a sale, under one of such descriptive names, from the clerk of the city, village or township in which he proposes to conduct such a sale."

The section then provides a penalty for any person violating it.

The advertising of a "liquidation sale" such as the motor company proposed is clearly within the provisions of the foregoing section and required the company to obtain a license from the City Clerk before advertising or conducting such a sale. We think the newspaper acted properly in refusing the advertisement as its acceptance would have subjected the company to the penalty provided for violating the statute.

Answering the question contained in the last paragraph of your letter we wish to advise you the State law applies not only to all automobile dealers who conduct similar "liquidation sales" but applies also to dealers in any goods, wares or merchandise who desire to conduct any of the classes of sales enumerated in the section above quoted.

TOBACCO DEALER'S LICENSE FOR CONCESSIONAIRE

(No. 11840—City Collector—M. I. W.—August 6, 1954.)

In your letter of August 3, 1954 you quote from a letter received from the Kelner Vendors Company, 3730 W. Division Street, with regard to the purchase of cigarette licenses by a concessionaire for Industrial Plants where no minors are employed and cigarettes are sold through vending machines. The question is raised as to whether a retail tobacco dealer's license may be purchased in the name of the "concessionaire" when the contract with the plant is to the effect that they are renting space to the concessionaire for the retail sale of cigarettes. Your correspondent further states as follows:

"Industrial plants do not want to be liable for any violations of State, Federal or Local laws with regard to cigarettes and they want the concessionaire to assume all responsibility.

"We, as concessionaires want that responsibility, and therefore we would like to purchase all licenses in our name at each address." You request our opinion on this matter.

The provision of the Cigarette Vending Machine Ordinance containing the requirement for a retail tobacco dealer's license is found in Section 178-22 and reads as follows:

"It is unlawful for any person to install, use or permit the installation or use of any cigarette vending machine at any place *unless the person in control of such place is licensed as a retail tobacco dealer* and unless said location is described in the registration certificate of that cigarette vending machine." (Coun. Jour. June 30, 1954, p. 7820.)

We see nothing in this section or the ordinance as a whole which prohibits an industrial plant from entering into an agreement renting space to a retail tobacco dealer to locate a cigarette vending machine in its plant. Such a retail tobacco dealer would then have "control" of the place in the plant designated under the agreement for all purposes related to the operation of the machine and would thus meet the requirements of the ordinance.

Any other interpretation of the word "control" as used in the ordinance would have the effect of prohibiting a common and useful means of supplying goods and services which enjoys widespread use, namely the concession. We do not believe such a prohibition should be applied by construction in the absence of a clear expression of the City Council of its intention to so legislate.

It is, therefore, our opinion that a retail tobacco dealer's license may be purchased in the name of a concessionaire when the contract with an industrial plant provides for the renting of space to the concessionaire to install a cigarette vending machine as a retail tobacco dealer. It is, of course, understood that as in the case of retail tobacco sales other than by machine, a separate retail tobacco dealer's license must be obtained by the retail tobacco dealer for each of the premises in which cigarette vending machines are installed.

TOBACCO DEALER'S LICENSE FOR CONCESSIONAIRE

(No. 11851—City Collector—M. I. W.—September 16, 1954.)

In your letter of September 10, 1954, you enclose a copy of a letter from the Cigarette Service Company in which they set forth that they install a cigarette case and stock same with cigarettes at various locations within the city. A serviceman of Cigarette Service Company calls at these locations twice a week, makes an inventory of the cigarettes and collects monies from the proprietor for the number of packages of cigarettes sold and then replenishes the stock. It is further set forth that the proprietor receives from the company, the first week following each calendar month, a check "for his percentage of cigarettes sold or for rental of his premises".

Heretofore licenses have been purchased by the company on behalf of and in the name of the various proprietors of the individual locations. The question which is raised and on which you ask our opinion is whether cigarette dealers' licenses may be issued to the Cigarette Service Company for these various locations in the name of the company.

Provisions of the Municipal Code of Chicago relating to licenses for retail tobacco dealers are found in Chapter 178.

We found no provision in this chapter which would prohibit the type of arrangement described in your letter.

In an opinion directed to you dated August 6, 1954, we held that under a concession arrangement similar to that described here, a license could be issued in the name of the owner of a cigarette vending machine where the agreement with the establishment where the machine was to be placed provided for the rental of space to the concessionaire to install his machine. We held in that opinion that in such cases the owner of the machine was acting as a retail tobacco dealer. It should be noted that in arriving at this conclusion we were dealing with the same basic licensing ordinance covering retail tobacco dealers, plus the cigarette vending machine ordinance in which language, not found in the dealers licensing ordinance, requires the person in "control" of the premises wherein the machine was installed, to be licensed as a retail tobacco dealer. We construed the effect of the word "control" as not prohibiting a concession arrangement by which "control" was that acquired under a rental agreement for the space occupied by the machine.

Since the basic licensing ordinance has no such language, the case for permitting this type of arrangement without the use of vending machines is, if anything, even stronger.

It has long been the custom to grant a tobacco dealer's license to a concessionaire in his own name in the case of a cigarette stand concession operating on premises principally occupied by another business. We see no reason under the language of the ordinance and in consideration of its purpose, to prohibit an arrangement between parties where the concessionaire licensed in his own name, makes use of the services of personnel principally engaged in the basic business of the establishment as his agents for the sale of cigarettes. The city is satisfied when the licensee and the premises meet the requirements set by the ordinance and the city can look to a licensee, easily found, for purposes of regulation and control. Any difficulties of controlling the actions of persons actually dealing with the public are the concern of the licensee who as principal must accept responsibility for acts of his agents.

It is therefore our opinion that a retail tobacco dealer's license may be issued to a concessionaire in his own name where cigarettes are placed by the concessionaire in a location under an arrangement for rental of space occupied by the cigarette cases and where the proprietor of the premises acts as agent for the concessionaire in dealing with the public.

TRANSPORTATION OF AMMUNITION BY TRUCK

(No. 11864—Chief, Fire Prevention Bureau—A. F. G.—November 8, 1954.)

In your letter of October 28, 1954 you request us to furnish to the Wilson Truck Company of Nashville, Tenn. information in regard to their letter of October 18, 1954, which reads as follows:

"In accordance with your letter of October 8th, we have examined chapters 60 and 125 of the Municipal Code of the City of Chicago.

We would like to inquire whether Section 125-32 can be interpreted to mean that compliance by a certificated motor common carrier with the requirements of the Interstate Commerce Commission will be considered as compliance with the provisions of chapter 125 in regard to the handling of shot gun shells, small arms ammunition, and such like."

Section 125-32 of the Municipal Code of Chicago reads as follows:

"125-32. Nothing contained in this part of this chapter dealing with fire-works shall be construed as applying to the transportation of any article or things shipped in conformity with the regulations prescribed by the Interstate Commerce Commission, nor as applying to the military or naval forces of the United States."

Chapter 125 of the Municipal Code of Chicago deals with the subject matter of "Explosives and Fireworks". The first 26 sections of that chapter provide strict regulations for the handling, storage and shipment of explosives. Sections 125-27 to the end of the chapter deal with fireworks and provide comparatively minor regulations therefor.

Because of the distinction the ordinance makes between explosives and fireworks in the matter of regulations, it is evident the city council considered explosives much more hazardous.

It is our opinion, therefore, that by the reservation in section 125-32 quoted above the city council intended the reservation to apply only to that part of the chapter dealing with fireworks and did not intend that it should apply to that part of the chapter dealing with explosives which, by section 125-1 include shotgun shells, small arms ammunition and the like.

TRANSPORTATION OF FLAMMABLE LIQUIDS

(No. 11865—Chief, Fire Prevention Bureau—J. C. M.—November 9, 1954.)

In your letter of November 3, 1954 you enclosed a letter dated November 3, 1954 from Monsanto Chemical Company relative to the transporting of Benzol and Naphthalene and similar flammable liquids in tank trucks and tank trailers from Gary and Whiting, Indiana, over the public highways of Chicago to the piers or docks at the Calumet-Sag Channel in the vicinity of 95th Street and South Chicago Avenue where these liquids will be discharged directly to barges tied up at the piers or docks. After the barge loadings are completed, the barges would then traverse the Illinois Waterway and the Mississippi River to St. Louis. You also transmitted therewith a photo-

static copy of an opinion rendered by this office on January 13, 1953 which dealt with the "transfer of flammable liquids from an oil tanker to one or more barges in the main branch of the Chicago River immediately west of the outer drive bridge." The Monsanto Chemical Company inquire, through you, whether its proposed procedure will be in conformity with the Municipal Code of Chicago.

At the outset, be advised that the opinion rendered on January 13, 1953 has no application to transporting of flammable liquids over the public highways of the City.

The Fire Prevention Bureau is, under the Code, charged with the enforcement of the provisions of Chapter 129 dealing with flammable liquids and chemicals. As we view the provisions of the Code and the facts relating to the transportation of Benzol and Naphthalene over the public highways as proposed by Monsanto Chemical Company, the driver of every tank vehicle will carry a manifest stating "the point of origin and the destination of the trip which it is then making" (Section 129-55.8). The barge or barges to which the liquids are to be discharged can be considered under this section as the "user bulk storage" as it is the destination insofar as the City of Chicago is concerned.

In the transporting of flammable liquids by tank vehicle from without the city limits to a destination within the city limits, there must be a starting point where the police powers of the city become enforceable, *i.e.*, in the instant case, at the Illinois-Indiana State Line (Zone G. Section 129-55.4) and a terminal, the barges at the piers or docks of the Calumet-Sag Channel in the vicinity of 95th Street and South Chicago Avenue (the North-South routes in Zones A to F, Section 129-55.4(2)).

The wharves, docks and piers are under the jurisdiction of the City of Chicago (Section 8-5, Section 38-7, Section 38-13, Section 38-27.1 and others). Hence all the police powers of the City of Chicago are applicable to the transporting of flammable liquids to these locations and the discharging of the loads thereat.

It is our opinion that the provisions of Chapter 129 must be complied with by Monsanto Chemical Company and that the Fire Prevention Bureau has complete jurisdiction and control over such transportation until the flammable liquids are fully discharged into the barges tied up at the public piers or docks.

REVOCATION OF LICENSE FOR CLOSING OUT SALE

(No. 11868—City Clerk—A. F. G.—November 17, 1954.)

Your letter dated November 12, 1954, reached this office by messenger at 12:40 P.M. November 16, 1954. In this letter you ask: "Would merchandise purchased sixty-two days before application for a city permit for a 'Going Out of Business Sale' constitute a presumption of fraud?"

Standing by itself and having in mind Section 5 of the Fraudulent Sales Act, we would be inclined to say that such a purchase would not be presumptive evidence of fraud, but under certain circumstances such a purchase could very well raise a presumption of fraud.

If the company making the foregoing purchase, also made purchases of the same kind of goods within 51 days of the date of application for a permit, the latter purchase would be presumptive evidence of fraud, and would raise the reasonable presumption that the earlier purchase was also made for the fraudulent purpose of selling such goods at the licensed sale. You then ask

this question "Under these circumstances would we have the right to recall the permit that was issued at that time. Also would we have the right to refuse an extension of the permit after the ninety day period is up?"

We assume your questions are in reference to the permit issued by you to the Spiegel Company. The evidence presented to this office, and we are advised was also presented to you, shows that purchases were made within 60 days of the application for license and further and more important that large quantities of merchandise were sold under the permit which were not included in the inventory which the law requires to be filed under oath with the application.

It is our opinion, therefore, that the foregoing violations of the law and the conditions of the permit give you the right to revoke the permit, and to refuse any extension of the permit which the law under proper conditions authorizes you to grant.

REMOVAL SALE

(No. 11870—City Clerk—A. F. G.—November 23, 1954.)

This will acknowledge receipt of your letter of November 19, 1954 which is as follows:

"We have been asked by the Better Business Bureau with reference to the enclosed advertisement of Logan Furniture Company the following questions:

In this advertisement they quote—'Lost our Warehouse Lease—Logan must move'. Is this not a removal sale under the law? *They do not advertise merchandise for sale at the warehouse, but at their store at 4453 West Madison Street, removing furniture from the warehouse.*

We feel that it is a removal sale and Logan Furniture should list their inventory at the warehouse only, and make application for a permit."

We have examined the said advertisement from the Chicago American of November 19, 1954 advertising a forced sale of goods and merchandise by the Logan Appliance & Furniture Mart, Inc. 4453 W. Madison Street. You express the belief that the sale is a "removal sale" within the meaning of the "Fraudulent Sales Act" and we are inclined to agree with you. The said Act does not define what a "removal sale" is. We construe that term to mean any sale made necessary as a result of the forced removal of a company from one of its places of business. The Logan Company frankly admits in its advertisement that as a result of losing its lease, it "must move" and represents to the public that because of this forced removal it offers for sale a large stock of goods and merchandise "regardless of cost".

It is our opinion that this is one of the types of sales the law intended to regulate by requiring the persons advertising and conducting such sales to be licensed by the City Clerk and to file the inventory required by the statute. The purpose of the statute is expressed in its title which reads "An Act to prevent the fraudulent sale, and to regulate the sale, and to regulate the representation and advertising of, goods, wares or merchandise, and to provide penalties for the violation hereof".

You should notify the Logan Company to file an inventory and secure a license and on failure to do so notify the State's Attorney and take proper steps to prevent the sale.

CLOSING OUT SALE

(No. 11874—City Clerk—A. F. G.—December 10, 1954.)

On December 9, 1954 you sent to this office the following letter :

"Please advise us as to whether or not a 'Going Out of Business' license should be issued to Mr. Manny Okmin, 1712 West 95th Street, Chicago, Illinois.

Kindly refer to your letter to us of November 18, 1954, in which reference is made to a letter to the Better Business Bureau, from the Ridge Civic Council, dated October 27, 1954.

In his application, dated December 9, 1954, Mr. Manny Okmin states that he purchased 'Boys World, 1712 West 95th Street, Chicago, from Teller, Levit & Silvertrust, One North LaSalle Street, August 30, 1954.'

Mr. Okmin is not using the name 'Boys World' in any of the 'Going Out of Business' advertising. He is willing that this license should expire December 31, 1954."

We enclose herewith, on a separate sheet, the requirements of Section 2 of the "Fraudulent Sales Act" with reference to applications for license to conduct any type of sale enumerated in Section 1 of that Act.

If Mr. Okman files an application in conformity with Section 2 of the Act and you are satisfied that the type of sale he intends to conduct is truthfully described in the application we see no reason he should not be granted a license. If he intends only to offer for sale the stock purchased from "Boys World" and does not intend to remain in business after that stock has been completely sold, we think his license should be denominated a "liquidation sale" or a "closing out sale" and not a "going out of business sale". He has been in business only a few months and to advertise that he is conducting a "going out of business sale" would be misleading. You should be guided in determining the type of sale to be conducted by the statements in his sworn application.

MEXICAN BURROS

(No. 11894—City Collector—D. D. K.—April 13, 1955.)

In your letter of April 4, you request our opinion as to (1) the license requirements, if any, governing the sale of Mexican burros in Chicago, and (2) whether the keeping of such animals as pets would be in violation of Chicago's health and sanitation ordinances.

1. Section 105-1 of the Municipal Code of Chicago provides :

"No person shall engage in the business of buying, selling, or dealing in birds, dogs, or other small animals used as household pets or used for domestic purposes without first obtaining a license."

Now, does the language of this ordinance include Mexican burros?

A reasonable interpretation of Section 105-1 makes it quite apparent that this Section was meant to apply to *all* of the numerous animals com-

monly thought of as pets, even though they are not specifically enumerated. Obviously, such an enumeration would be both impractical and unnecessary. And so, we find such well known pets as cats, monkeys and turtles, to name only a few, not being mentioned in the ordinance. Certainly, the Council intended that the ordinance apply to these animals.

The Mexican burros here in question present somewhat of a unique problem, since they apparently have never before been sold in Chicago. From the information furnished by you, and what we ourselves have been able to determine, these animals have the following attributes: They never grow any larger than 36 to 40 inches in height, and their average weight is 100 pounds. They are extremely tame and make excellent pets for children. They are quite hardy, rarely becoming sick or diseased. They have no body odors and make less noise than a barking dog. They can be kept in a yard, just as one might keep a large dog, and they require less care and attention than a dog does.

We are inclined to believe that these burros would be covered by the above ordinance. We base this belief upon the above stated information concerning their nature and habits. Also, they would have to be considered as a "small animal," since a number of species of well known dogs grow considerably larger and heavier.

It is our opinion that the sale of Mexican burros would be covered by Section 105-1 of the Municipal Code of Chicago.

2. Again, based upon the above information regarding burros, we see no reason why the keeping and using of them as household pets and domestic riding animals would of itself be in violation of any general health and sanitation ordinances. The owner of a burro would, of course, still have to comply with the provisions of Chapter 98 and Sections 99-4 and 99-7 of the Code, since these provisions are applicable to the keeping of all animals and the areas or structures wherein they are kept.

It is our opinion that the keeping of a Mexican burro would not be in violation of Chicago's health and sanitary regulations, provided, of course, that the other Code provisions relating to the keeping of all animals are complied with.

LOCAL OPTION ELECTION

(No. 11925—City Collector—A. F. G.—July 8, 1955.)

Your letter of June 28, 1955 is as follows:

"At the general election held in Chicago on April 5th, 1955, the 53rd precinct of the 6th Ward voted to permit the sale, at retail, of alcoholic liquor in the original package and not for consumption on the premises, official notice of the proposition and tally of the vote thereon was received by the City Collector from the Office of the Board of Election Commissioners.

On June 24, 1955 the Collector's Office received an application by the Florence Pharmacy, Inc., for permission to sell alcoholic liquor at retail on the premises known as 1401 East Marquette Road. The premises are located in the 53rd precinct of the 6th Ward.

This office is in receipt of a letter from the South East Chicago Commission, a copy of said letter is enclosed herewith, in which they question the validity of the proposition as placed upon the ballot and request that any application made for sale of liquor in the precinct be referred to the Corporation Counsel for determination, etc.

As a guide for this office with respect to the pending application as well as to any future applications for sale at retail of alcoholic liquor in said precinct the City Collector desires your opinion as to the proper procedure to follow. Due to the pending litigation, as evidenced by the enclosed letter, the City Collector is concerned as to the propriety of accepting liquor application fees for locations in said precinct and under the circumstances whether or not he is authorized to order the issuance of such liquor licenses should the applications be approved by the proper authorities."

Your letter was accompanied by a letter from the Executive Director of the South East Chicago Commission, in which the subject matter of your letter is discussed.

From the last letter it appears that the 53rd precinct of the 6th Ward was voted wholly dry on November 6, 1946, under the provisions of Section 2 of Article IX of the Illinois Liquor Control Act (Paragraph 167, Chapter 43, Ill. Rev. Stats. 1953). Section 9 of the same Act (Paragraph 174, Chapter 43, Ill. Rev. Stats. 1953) provides that upon the filing in the office of the Clerk at least 60 days before an election, in any precinct or group of precincts of a petition directed to such clerk containing the signatures of the required number of legal voters of territory *which has prohibited the sale at retail of alcoholic liquor*, to submit to the voters thereof *the proposition to continue such prohibition*. If a majority of the legal voters voting on the last mentioned proposition in such precinct or group of precincts vote "No", such prohibition shall cease in such precinct or group of precincts.

By this section, the Legislature has fixed the particular manner in which territory which has prohibited the sale at retail of alcoholic liquor, may continue or discontinue that prohibition, and provides no other way. It is a well known rule that where a statute provides that a thing shall be done in a particular manner or by a particular person, it may not be done in any other manner or by any other person.

The proposition submitted to the voters at the election of April 5, 1955 is as follows:

"Shall the sale at Retail of alcoholic liquor containing more than 4% of alcohol by weight except in the Original Package and not for consumption on the premises be prohibited in the 53rd Precinct of the 6th Ward of the City of Chicago."

If this proposition had been submitted in a precinct which had not previously prohibited the sale at retail of alcoholic liquor it probably would be held to be a valid referendum under Section 2 of the Act. In view of the express provisions of Section 9 of the said Act it is our opinion the adoption of the said proposition did not operate to discontinue the prohibition adopted November 5, 1946.

In view of the opinion herein expressed we suggest that you refuse to issue a license to operate a package liquor store or any other liquor establishment in the 53rd Precinct of the 6th Ward.

DAY NURSERY PLAY AREA

(No. 11932—President, Board of Health—M. C. H.—July 28, 1955.)

This is to acknowledge receipt of your letter to this office in which inquiry is made both in writing and orally by Miss Plotzke of your office whether or not your office shall follow the laws of the State of Illinois as to day care centers in which it is provided,

"there shall be a minimum of thirty-five (35) square feet of play space per child,"

notwithstanding the fact that the Municipal Code of Chicago Chapter 48-4 classifies day nurseries as Class C Schools with a capacity of twenty (20) square feet per person.

In the case of *City of Chicago v. The Union Ice Cream Manufacturing Co.*, 252 Ill. 311 at page 315, the court said:

"Municipal authorities cannot, under a general grant of power, such as article 5 of the City and Village act adopt ordinances which infringe the spirit of a State law or are repugnant to the policy of the State as declared by general legislation, but the police regulations of a municipality may differ from those of the State upon the same subject, if they are not inconsistent therewith."

The same rule of law was held to be true in the case of *Fieldcrest Dairies, Inc. v. City of Chicago, et al.*, 122 F. 2d 132, 7 Cir. In that case, Judge Major, at page 138, said:

"The authorities are uniform that any ordinance which conflicts with any statute or public policy adopted by the State Legislature is invalid. The rule is aptly stated in 2 McQuillin on Municipal Corporations, 572: 'A Municipal corporation cannot, without special authority prohibit what the policy of a general statute permits. Nor, on the other hand, can an ordinance permit that which the State's policy forbids. Consequently under a general grant of power, a municipal corporation cannot adopt ordinances "which infringe the spirit, or are repugnant to the policy, of the state as declared in its legislation."' It thus follows that if the state has expressed through legislation a public policy with reference to a subject, a municipality cannot ordain in respect to that subject to an effect contrary to, or in qualification of the public policy so established. * * *"

In view of the foregoing, it is safe to assume that while an ordinance, because of local existing conditions, may impose more rigorous or more definite regulations in addition to those imposed by the State, the City cannot pass any ordinance which is inconsistent with the State laws. This rule has been recognized by all Illinois courts. It is therefore suggested that you proceed to enforce the State laws relating to day nurseries.

Please be further advised that the Building Department of Chicago has agreed to insert in the permit issued to day nurseries the measurements of play space so you will no longer be called upon to measure the square foot areas of the play space in said day nurseries.

DUMPING ON VACANT PROPERTY

(No. 11937—Alderman, 40th Ward—R. N.—August 18, 1955.)

Your inquiry of August 12, 1955, as to the responsibility of the owner of property maintained in violation of sections 99-61.7 and 99-61.8 of the Code, may be separated into three parts and answered as follows:

1. You state that you are continuously bothered in the 40th Ward by dumping on vacant property without the consent or knowledge of the owner. Section 99-4 of the Code, which reads in part:

"No * * * yard, lot, premises, or part thereof, shall be made, used, kept, maintained, or operated in the city, if such use, keeping, maintaining, or operating shall be the occasion of any nuisance or shall be dangerous to life or detrimental to health."

makes no reference to any requirement of consent or knowledge on the part of the owner. Sections 99-1, 99-2 and 99-3 set out the procedures

which may be followed in the abatement of conditions in violation of the above as well as other nuisance sections of the Code.

2. You asked specifically if, under sections 99-61.7 and 99-61.8, the owner of the premises is liable even though garbage and trash is allowed to accumulate without his knowledge or consent. Again, a reading of the sections under consideration indicates no requirement of consent or knowledge on the part of the owner whose premises are permitted to become a nuisance. This is further borne out by a reading of the section immediately following 99-61.9 which provides for notice concerning violation of the two preceding sections upon the *owner, agent or occupant* of the premises and makes further provision for the abatement of the nuisance by the city upon the failure of the *owner*, to comply the cost and expense thereof to constitute a lien against the premises.

3. Inasmuch as our conclusion is that the owner of property maintained in violation of the above provisions of the Code is unquestionably liable therefor, regardless of his consent or knowledge, it is the opinion of the law department that the matter you complain of is a question of enforcement only and that no further legislation is necessary.

DESK CLERK ORDINANCE

(No. 11991—Chief of Fire Prevention Bureau—J. C. M.—December 28, 1955.)

In your letter dated December 15, 1955 you make certain inquiries as to the application of the "Certificated Desk Clerk Ordinance" which was adopted by the City Council at its meeting of December 9, 1955.

We will answer these inquiries in the order in which they were made:

(1) Does the ordinance apply to apartment hotels having sleeping accommodations for twenty or more persons for a period of one day or more?

Answer: The ordinance applies to apartment hotels where public sleeping accommodations are furnished or maintained for twenty or more persons for a period of one day or more.

(2) Are dormitories connected with schools, fraternities and other like occupancies included within the terms of the ordinance?

Answer: In our opinion dormitories connected with schools, fraternities and the like do not come under the terms of the ordinance. They do not constitute a business or occupation where public sleeping accommodations are furnished or maintained.

(3) Are athletic clubs, Elinor clubs and similar occupancies included within the meaning of this ordinance?

Answer: In our opinion athletic clubs having the minimum sleeping accommodations as provided by the ordinance are subject to the terms of the ordinance. The maintenance and operation of the hotel section of the club accommodates members of the public even though restricted to members of the club and is part of the club's business. We do not have sufficient information as to "Elinor Clubs" to advise you as to their status at this time.

(4) Are apartment buildings within the terms of the ordinance?

Answer: In our opinion apartment buildings do not come within the terms of the ordinance.

(5) Method of computing sleeping accommodations.

Answer: This inquiry is in reference to whether a double bed is to be considered as accommodations for two persons in determining whether the business comes within the terms of the ordinance. In *Farrior v. State*, 13 So. (2d) 147, the court held that in computing sleeping accommodations, double beds should be counted as sleeping accommodations for two.

(6) Meaning of the words "on duty".

Answer: The words "on duty" as used in the ordinance are intended to mean that the certificated clerk shall be fully clothed, awake and occupied in such occupation.

ALUMINUM CARGO TANKS

(No. 12003—Chief of Fire Prevention Bureau—J. P. M.—January 19, 1956.)

We have your letter of January 12, 1956, in which you request an opinion as to whether aluminum may be used in place of steel in cargo tanks mounted on vehicles engaged in transportation of flammable liquids.

Chapter 129-53, Municipal Code of Chicago, provides in part as follows:

"Tanks other than the fuel tanks of tank trucks shall comply with the following provisions:

(a) *Material, capacity and gauge.* Except as hereinafter provided, tanks shall be constructed throughout of open hearth or blue annealed steel, of a thickness and gauge in accordance with the provisions of the following table:

Aggregate capacity (gallons)	Shell (U.S. standard gauge)	Head (U.S. standard gauge)
Up to 600 inclusive	14	14 if bilged or corrugated, otherwise 12
601 to 1200 inclusive	12	12 if bilged or corrugated, otherwise 10
Over 1200	10	8

Tanks exceeding twelve hundred gallons in capacity may be constructed with twelve gauge shells and ten gauge heads; provided, however, that they are subdivided into compartments of six hundred gallons or less capacity, and are mounted on chassis equipped with low pressure balloon pneumatic tires. Other metals of equivalent strength to the gauge of open hearth or blue annealed steel required by the above table may be used in lieu of open hearth or blue annealed steel."

It is our opinion that the above cited chapter of the Municipal Code of Chicago permits the use of metals of equivalent strength to the gauge of open hearth or blue annealed steel required by the table set out above. If the aluminum intended to be used is of sufficient strength, as required by the above table, then aluminum may be used for cargo tanks for transportation of flammable liquids.

REGULATING PEDDLERS, DOOR TO DOOR SALESMEN

(No. 12006—Alderman, 39th Ward—A. F. G.—January 30, 1956.)

We have your letter of January 20, 1956 requesting that we advise you with respect to Chicago ordinances concerning peddling and, whether or not the City has signs prohibiting peddling available. With your letter you enclosed a letter from the Sauganash Community Association which reads as follows:

"At a recent meeting of the association members brought up complaints about the number of peddlers coming to houses in Sauganash. There was some fear evidenced that some of the solicitors could well be 'fingering' houses in the neighborhood for future burglaries.

Some members also recalled that signs forbidding peddling in the neighborhood used to be in evidence, but that they have now disappeared.

Will you let us know about the Chicago ordinances regarding peddling and whether it would be possible to resurrect and place around the neighborhood such signs as we used to have?"

Chapter 160 of the Municipal Code of Chicago deals with "peddlers". Section 160-1 defined the word "peddler to mean any individual who going from place to place shall sell, offer for sale, sell or deliver, barter or exchange any goods, wares, merchandise, wood, oil, fish, fruits, vegetables or country produce from a vehicle or otherwise".

Section 160-2 of the said Code divides peddlers into three classes and defines each class.

Class I. Wagon or cart peddlers.

Class II. Pack or basket peddlers.

Class III. Wagon or cart peddlers selling wood only.

Section 160-3 makes it unlawful to engage in the business of peddler without a license.

Section 160-13 of the said code is as follows:

"160-13. Peddling prohibited in certain districts.) No one having a peddlers license shall peddle any merchandise or any other article or thing whatsoever, at any time, within districts which have been or shall hereafter be designated by the city council".

On November 15, 1939 an ordinance was passed prohibiting peddling in the area bounded by W. Devon Avenue; W. Bryn Mawr; N. Cicero and the Chicago and North Western Railway. The ordinance contained no provision requiring the posting of "No Peddling" signs in the prohibited area.

The office of chief traffic engineer posts all traffic signs required by statute or ordinance and for a time posted "no peddling" signs in prohibited areas, though not required to do so by ordinance. They discontinued the practice some time ago because of the volume and expense and have no signs available.

At the time these "no peddling" districts were created, large numbers of peddlers selling fruits, vegetables and similar products from wagons and carts carried on their business in the city. They generally drove through the alleys, crying their wares and frequently disturbed the peace and quiet of residential neighborhoods, and so these prohibited areas were established.

This office has held that a business concern which sends canvassers and solicitors from house to house to secure orders for merchandise from samples, could not be restrained from its activities under the ordinance regulating peddlers (Opinions Corporation Counsel, vol. 19, p. 54).

Even a complete posting of the area and a strict enforcement of the peddlers ordinance would not erase the potential danger of burglary feared by the Sauganash community, for the reason that solicitors and canvassers may legally carry on their vocations.

The city collector advises us that only 695 basket or pack peddlers, the class which normally would sell from door to door, were licensed by the City during the year 1955.

As the City lacks power to license or regulate solicitors or canvassers, who are free to carry on the work anywhere in the city, the danger complained of will remain.

FENCING VACANT LOTS

(No. 12025—Alderman, 5th Ward—A. F. G.—March 28, 1956.)

Your letter of March 1, 1956 reads as follows:

"I am very interested in the problem that most unattended vacant lots cause in a neighborhood. I am continually receiving complaints about abandoned vehicles, other debris and garbage that is dumped in these lots. Our Ward Superintendent, Mr. Seeberger, has been most cooperative and on several occasions has allowed his men to go on this private property and clear off the rubbish.

Certainly the city should not be expected to maintain this private property and I am interested in knowing what your opinion would be about an ordinance requiring property owners to fence in their property. Would it be possible to give these owners a certain period of time, three to six months for instance, and if the property had not been enclosed at that time, the city would do it and add the amount to the tax bill at the end of the year.

If you have any other suggestions on this matter I would be most happy to receive them."

The grant of power to cities with respect to fences is found in Section 23-69 of the "Revised Cities and Villages Act", and reads as follows: "To regulate partition fences and party walls". It will be noted that this power is limited to "partition fences" and does not apply to fences generally. Chapter 54 of the Revised Statutes of Illinois entitled "Fences" deals with the subject of "partition fences". The language of this Act indicates clearly the legislative intent that the requirements of the Act are to be applicable to rural or farming communities and was not intended to apply in large cities. The Act is administered and enforced by officers known as "Fence viewers", an office unknown to the City of Chicago. In more than one prior opinion this office has construed the Partition Fence Act in a similar manner (Opinions Corporation Counsel Vol. 11, p. 374, Vol. 23, p. 384).

Even if the Courts should hold that the "Fence Act" was applicable to city lots, the Act would not require the fencing of the entire lot. The Act only requires fences to be erected jointly by the owners of adjoining property and then only on the property line. Generally the front and rear lines of city lots abut streets and alleys and nothing in the Fence Act requires property owners to fence such portions of their lots.

Under the general police power the City may require fences but only where such fences are necessary for the protection of life and property. Section 193-15 requires the owners of property on which there are clay holes or similar excavations to enclose such clay holes or excavations with wooden or wire fences not less than 6 feet high. Section 143-10 provides that every premise or enclosure, except a completely enclosed building, used for the storing of parts of dismantled vehicles shall be entirely surrounded by a fence eight feet in height. Section 99-4.1 requires a similar fence to surround a lot, yard or premises used for the purpose of storing used lumber, metal or other second hand building material.

Chapter 61 of the Code—Miscellaneous Buildings and Structures, Section 61-5 to Section 61-5.4 defines Fences, fixes their maximum height, describes materials, fixes wind load and provides restrictions on the use of barbed wire, but contains no provision requiring fences at any prescribed location.

If the City had power to require the owner of every vacant lot in the city to enclose the same with a six or eight foot wood fence, we think the result would be more unsightly than the presence of a few discarded auto bodies.

If an ordinance such as you suggest were enacted, and the owner of the property failed after notice to comply and the City erected the fence, we do not believe the City could add the amount expended to the owner's property tax bill. It would not have a lien for such expenditure unless the Legislature expressly granted a lien to the City. Our courts have held that where a City expends money to abate a nuisance, it may sue for such expenditure, and the judgment recovered would be a lien against the property; however, it would not be entitled to a statutory lien unless the law authorized such a lien (*Village of Palmyra v. Warren*, 114 Ill. App. 562 (1904)).

Section 61-5.2 (b) limits to six feet the height of a combustible solid fence. Such a fence would not prevent the dumping of much refuse on the enclosed lot from a truck using the alley at the rear of such lot. Dumping on private property is prohibited by several sections of Chapter 99 of the Code. A stricter enforcement of these provisions would probably minimize the situation you refer to.

It is our opinion, therefore, that the City is without power to compel owners of private property to fence in such property, except in such cases as come within the police power of the City.

LENGTH LIMITATIONS ON TRAILERS

(No. 12026—Commissioner of Police—A. F. G.—April 4, 1956.)

Your letter of March 23, 1956 is as follows:

"Forwarded herewith is a communication I directed to the Chief of the Traffic Division regarding a letter from Leonard M. Cohen, attorney, 105 W. Madison St. on behalf of his client, Mid States Trailer Transport.

Also forwarded is a reply from the Chief of the Traffic Division on the subject.

Will you kindly advise me as to our position in the matter."

Your letter to the chief of traffic reads as follows:

"Mr. Cohen writes on behalf of his client, Mid States Trailer Transport, 9330 Constance Ave. a carrier of house trailers by towaway

methods. Client has received a summons under Section 27-162, marked 'overlength, 59 feet'. The client desires to comply with the code but there is confusion as to what is required. Commissioner of Streets takes the stand that no permit is required for vehicles less than 60 feet. He further states he cannot issue a permit unless the vehicle exceeds 60 feet. Client has knowledge of similar tickets being issued recently by officers in like circumstances.

He would like an interpretation of the ordinance described.'

In answer to this communication the chief of traffic replied in part as follows:

"4. Mr. Bechtel, Midstates Transport Co. reports that Ptlm. Chas. A. Smith, #1405, 11th District, issued three tickets for violation of 27-162 City Traffic Code—combination of vehicles 59 feet in length—operating without a permit when combination of vehicles exceeds that permitted by city ordinances and state law (over 50 ft.).

5. Midstates Transport Co. reports that they obtained a permit from State Authorities but were unable to obtain one from the City because city officials say no permit is necessary when combination of vehicles is under 60 ft.

6. It appears that Sec. 27-162 (a) City Traffic Code requires a special written permit to operate or move a vehicle or combination of vehicles of a size or weight of vehicle or load *exceeding the maximum specified in laws of the state*.

7. Sec. 27-162 (d) City Traffic Code requires a permit for transportation of a single article which cannot be divided and which exceeds 60 ft.

8. It is our opinion that both City and State permits are required for vehicles or combinations of vehicles which exceed 50 ft. in length.

9. It is recommended that an opinion be obtained from the Corporation Counsel re the above and if he agrees with our opinion, the Permit Section, Commissioner of Streets and Sanitation should be so notified."

Section 127 (b) and (c) of the Uniform Act Regulating Traffic on Highways (Par. 224 Chap. 95½ Ill. Rev. Stats, 1955) is as follows:

"(b) No combination of truck tractor and semi-trailer unladen or with load, shall exceed a length of 50 feet extreme over-all dimension. A truck tractor semi-trailer may draw one trailer, and no such combination, unladen or with load, shall exceed a length of 50 feet extreme over-all dimension.

(c) No other combination of vehicles coupled together shall consist of more than two vehicles and no such combination of vehicles, unladen or with load, shall exceed a length of 50 feet extreme over-all dimension."

Paragraph (d) of this section provides:

"Length limitation shall not apply to vehicles operated in the daytime when transporting poles, pipe machinery or other objects of a structural nature which cannot readily be dismembered, nor to such vehicles transporting such objects operated at nighttime by a public utility when required for emergency repair of public service facilities or properties, or when operated under special permit as provided in section 133 * * *."

Section 133 (a) of the same Act (Par. 230 chap. 95½ Ill. Rev. Stats. 1955) is in part as follows:

"(a) The Department with respect to highways under its jurisdiction and local authorities with respect to highways under their jurisdiction, may, in their discretion, upon application in writing or by telegram and good cause being shown therefor, issue a special permit in writing or telegram authorizing the applicant to operate or move a vehicle or combination of vehicles of a size or weight of vehicle or load exceeding the maximum specified in this Act or otherwise not in conformity with the provisions of this Act upon any highway under the jurisdiction of the party granting such permit and for the maintenance of which said party is responsible. * * *

The section provides details for the issuance of the permits, limiting the number of trips, and prescribing the routes to be traveled and requires the permit to be carried on the vehicle.

Chapter 27 of the City Code "Traffic Regulations" defines the powers and duties of the city officials in the regulation of traffic. Section 27-162 provides for the issuance of permits for vehicles exceeding in size and weight the maximum fixed by State law. Paragraph (a) of that section authorizes the commissioner of streets and sanitation, when in his judgment an emergency exists and in his discretion, upon application in writing and good cause being shown, to issue a special permit in writing, authorizing in writing the applicant to operate or move a vehicle or combination of vehicles of a size or weight of vehicle exceeding the maximum specified in the State law (50 feet). Paragraphs (b) and (c) provide conditions and limitations on the issuance of such permits. Paragraph (d) of this section provides that when an application for such a permit is for the transportation of a single article that is not divisible and which exceeds 60 feet in total length the commissioner may issue such permit, upon the payment by the applicant of a fee of ten dollars and the filing by him of a bond of \$25000. dollars and conditioned so as to save the City harmless from any claim, loss or damage.

From the foregoing, we are of the opinion that to move a vehicle or combination of vehicles over the city streets a permit is required where the length of the vehicle or combination exceeds 50 feet, and also that no permit is required to move a single article which cannot be divided unless the article exceeds 60 feet. If it does exceed 60 feet a permit, fee and bond is required as provided in paragraph (d) of section 27-162. We think it was a mistake for the commissioner to hold that no permit was required for a vehicle or combination of vehicles unless they were in excess of 60 feet as stated in the communication of the chief of traffic.

PROHIBIT DRUG ADDICT FROM DRIVING

(No. 12063—Commissioner of Police—A. F. G.—August 7, 1956.)

Your Letter of August 1, 1956 is as follows:

"Paragraph 192.30 of Chapter 38 of the 1955 Illinois Revised Statutes provides for the registration of drug addicts with the Department of Registration and Education. A further paragraph provides that this card shall be carried on the person of the addict at all times.

Section 47 of Article V of the Uniform Act Regulating Traffic states, in part, 'It is unlawful * * * for any person who is an habitual

user of narcotic drugs * * * or who is under the influence of narcotic drugs to drive any vehicle within the state'.

When a person operating a motor vehicle is stopped by a member of the police department and is found to be in possession of a narcotic user registration card, is the officer acting within his right in charging such person with violation of Section 47, Article V, U. A. R. T."

The section of the Criminal Code first referred to above requires all drug addicts to register as such with the Department of Registration and Education. The term "drug addict" is defined in the said Act to mean a "person who repeatedly uses narcotic drugs".

The section of U. A. R. T. referred to makes it "unlawful for any person who is an habitual user of narcotic drugs * * * to drive any vehicle within the State".

When a police officer finds a driver of a vehicle who has in his possession a registration card of the Department of Registration and Education, in his own name, registering him as a drug addict, it would appear to be the duty of the officer to charge the above driver with violating the section of U. A. R. T. above referred to.

HOSPITAL DESEGREGATION ORDINANCE

(No. 12066—Mayor—A. F. G.—August 14, 1956.)

On August 10, 1956 you sent to this office a memo transmitting a letter from William L. McFetridge, General President, Building Service Employees' International Union, 318 W. Randolph Street. To his letter was attached a letter he had received from James H. Kemp, President of the Building Service Employees International Union, Local No. 189, concerning an ordinance providing discontinuance of segregation in admission and treatment after admission to hospitals in Chicago.

You request we advise you how this ordinance will be enforced.

The ordinance referred to was adopted March 14, 1956 and appears in the Council Journal of that date at page 2351. Chapter 137 of the Municipal Code of Chicago entitled "Hospitals" provides for the licensing and regulation of hospitals in the city of Chicago and is under the jurisdiction and supervision of the board of health. This chapter was amended March 14, 1956 by adding thereto a new section 137-13.1 which reads as follows:

"No hospital, nor any person acting as superintendent or manager, or who is otherwise in charge or control of any hospital, nor any person connected with or rendering service in any hospital in any capacity whatsoever, nor any agent or employee thereof shall deny to any person admission for care or treatment, equality of care or treatment in a hospital, or the use of any of the hospital facilities and services relating to care or treatment of such person, on account of race, color, creed, national origin or ancestry, provided that a member of the medical staff of said hospital or an authorized physician designated to act for him may examine such person and determine the need of such person for medical care or treatment."

The penalty for violating this section is the same as is provided for violating any other provision of chapter 137. The penalty section of that chapter (137-19) imposes a fine of not less than \$100 nor more than \$200 for each offense.

Sections 21-49 to 21-52, inclusive, provides for the appointment by the mayor of a commission on human relations, sets out the purpose of such commission, defines its powers and functions, authorizes the commission to cooperate with the mayor, city council, city departments, agencies and officials in carrying out its purposes.

Section 21-52 reads as follows:

"The commission shall receive and investigate complaints and initiate its own investigations of tensions, practices of discrimination and acts of prejudice against any person or group because of race, religion or ethnic origin and may conduct public hearings with regard thereto; carry on research, obtain factual data and conduct public hearings to ascertain the status and treatment of racial, religious and ethnic groups in the city, and the best means of progressively improving human relations in the entire city; and issue such publications and such results of investigations and public hearings and make such recommendations to the mayor and city council as in its judgment will effectuate the policy of this ordinance."

In his letter Mr. Kemp does not say that the new provision of chapter 137 is not being enforced, but expresses the interest of his organization in its strict enforcement. We consulted the commission on human relations to ascertain if any complaints had been received by that body relative to the enforcement of the provision. They advised us that no complaints had been received. They advised us further that by arrangement with the board of health the commission will investigate complaints of any alleged violation of the provision whether the same is initiated by the board or from other sources.

The board of health has a fine reputation for enforcing provisions of law within its jurisdiction and working in cooperation with the commission on human relations, we do not believe that Mr. Kemp or anyone else interested in the enforcement of the new provision will have reason to complain of its enforcement.

SUNDAY CLOSING ORDINANCE

(No. 12087—Subcommittee, Judiciary and State Legislation—J. C. M.
November 16, 1956.)

We have given consideration to the proposed ordinance introduced in the City Council by Alderman Charles H. Weber (which we will refer to as the "Weber" ordinance), to amend Chapter 193 of the Municipal Code of Chicago by adding a new section, making it unlawful to sell certain commodities, engage in manufacturing and construction work, repair, maintenance work, personal service and ordinary labor on Sunday.

Since the proposed ordinance was referred to the subcommittee, several suggestions as to exemptions therefrom were made, namely:

- (1) Exempting delicatessen stores.
- (2) Exempting the public market (Maxwell Street Market) as defined in Chapter 35 of the Municipal Code of Chicago.
- (3) Exempting persons who conscientiously believe in and uniformly observe another day of the week as Sabbath and abstain thereon from doing the things prohibited on Sunday by this ordinance.
- (4) Exempting stores and shops located in hotels.

(5) Exempting real estate brokers or building owners as to the renting and sale of real estate on Sunday.

(6) It also has been suggested that the matter be placed on the ballot for referendum.

Under Chapter 24, Section 23-105, municipalities are given power by legislation to pass and enforce all necessary police ordinances. Under this power, the Supreme Court of Illinois has held that a municipality is authorized to pass a Sunday closing ordinance where such regulation is required for the protection of the public interest or for the public welfare (*City of Mt. Vernon v. Julian* (1938), 369 Ill. 447). The exercise of this power cannot be arbitrary but must have some relation to the end sought to be accomplished, that is to say, to the health, comfort, safety and welfare of society.

In *Eden v. People* (1896), 161 Ill. 296 the court held that a statute passed by the legislature which made it unlawful for any person to keep open a barber shop on Sunday or carry on the business of barbering on Sunday, was invalid.

In *City of Mt. Vernon v. Julian* (1938), 369 Ill. 447 an ordinance was held invalid which would prohibit the keeping open of a community grocery store which sold groceries, tobacco and other articles, while tobacco and confectionery stores selling the same products were permitted to open. The court there stated the law as follows (p. 454):

"If it be conceded that the general welfare is served by requiring one day of rest in each seven days, excepting only works of charity and necessity, the ordinance we are considering fails to attain this purpose. No reason is suggested and we can think of none why the shop of a dressmaker or milliner should be required to close when a newsstand continues to operate. We do not see where the public welfare is served by closing the grocery store and allowing a confectionery store to remain open, nor in closing a notions store while a drug store next door which sells notions is permitted to operate. * * *. This court has repeatedly announced the rule to be that liberty, as that term is used in the constitution, means not only freedom of citizens from servitude and restraint, but is deemed to embrace the right of every man to be free in the use of his powers, faculties and property and to adopt and pursue and employ these things in such lawful way as he may choose, subject only to such restraints as are necessary to secure the common welfare."

In the most recent case decided by the Supreme Court, namely, *Humphrey Chevrolet, Inc. v. City of Evanston* (1955), 7 Ill. 2d, p. 402, the court held to be valid an ordinance adopted by the City of Evanston, which ordinance is almost identical to the Weber ordinance. An analysis of the opinion shows that the court was really considering the first section of the ordinance and held that the ordinance was valid as a proper restraint upon the sale of automobiles on Sunday in Evanston.

Re: Paragraph A of the Weber Ordinance

The only difference that we see in the Weber ordinance and the Evanston ordinance is that in the first paragraph of the Evanston ordinance reference to the provision as to "the sale of dispensing of articles of food or drink for human consumption" was limited with the following words: "on the premises of the seller." The Weber ordinance does not contain the latter words. As drawn, the Weber ordinance would permit the sale or dispensing of articles of food or drink in grocery, delicatessen and packaged liquor stores. Such sales would be prohibited by the Evanston ordinance. If it is desired to prohibit such sales, the above quoted words should be inserted in the ordinance.

It must be noted that the Supreme Court's decision in the *Evanston* case confined its decision to the right of a municipality to prohibit the sale of commodities on Sunday with certain exemptions. This was the first time that court passed upon the "commodity type" ordinance. In the previous decisions the court passed upon legislation which prohibited certain *businesses* from remaining open on Sunday while permitting other businesses selling the same products to remain open. It, therefore, appears to us that you cannot permit sales in a delicatessen store of food or drink for human consumption and prohibit a grocery store or super-market from making sales on Sunday. Nor do we believe you may permit shops and stores in hotels to sell merchandise (other than the exempted articles) and prohibit others from selling like merchandise.

Re: Public Markets.

The next exemption suggested under Paragraph A of the Weber ordinance relates to public markets, principally Maxwell Street Market. There are presently in the Code provisions restricting sales on Sunday at the Randolph and State Street public markets. In our opinion such an exemption (except as to the enumerated articles referred to in the ordinance) would invalidate the ordinance.

Re: Paragraph B of the Weber Ordinance

As we interpret Paragraph B of the Weber ordinance, steel mills and heavy industry plants would have to close on Sunday as would all manufacturing and construction work not therein exempted. We merely call this to your attention without in any manner attempting to pass judgment on the effect of such prohibition. It has been suggested by certain proponents of the Weber ordinance that a limited exemption be added by insertion of the following words in the ninth line of the paragraph, after the words "construction work", "for the national security or defense or" and inserting after the word "emergency" in that line, the words "health, safety or general welfare." It appears to us that it would be difficult in the enforcement of such exemption to determine when manufacturing and construction work is in the interests of "national security or defense."

Re: Paragraph C of the Weber Ordinance

The Supreme Court in the *Evanston* case did not consider the validity of sections B, C and D of the ordinance as no direct attack was made thereon and we cannot consider as settled that these provisions are valid. We are of the opinion that Paragraphs C and D are vulnerable when the rights of the Chicago press, television and radio commentators or performers on programs originating in Chicago are considered. We do not believe that the City Council can stop the presses or the other forms of communication.

It is, therefore, suggested that after the words "motor vehicles" in the seventh line of Paragraph C, the words "communication facilities and printing presses necessary in the publication of news" be inserted so that there is no interference with the use of television and radio and newspaper equipment.

Re: Paragraph D of the Weber Ordinance.

Consideration should be given to the use of the operation of parking facilities on Sunday, in order to eliminate congestion on the streets in connection with the use of public places of amusement and recreation. Provision should also be made as to exempting "communications and their facilities, the accumulation, composition and printing of news" as suggested above. The sale and distribution of newspapers and magazines is exempted in Paragraph A. If it is determined to provide therefor, we suggest that after the words "public utility facilities" in the eleventh line of Paragraph D, there be added

the words "communications and their facilities, the accumulation, composition and printing of news and the operation of parking facilities."

Consideration should be given to the operation of ships and boats in the Chicago River, Lake Calumet and the Chicago Harbor. While public transportation facilities are exempted, private transportation facilities are not exempted.

The ordinance does not provide for any penalty. In view of the fact that this is to be a new section of the Municipal Code of Chicago, it should be complete with a penalty provision.

Re: DuBois' Amendment

The amendment proposed to the Weber ordinance by Alderman DuBois is:

"Nothing in this ordinance shall apply to any person who conscientiously believes in and uniformly observes another day of the week as Sabbath and abstains thereon from doing the things prohibited on Sunday by this ordinance."

This exception is almost uniformly found in the statutes enacted by States having Sunday closing laws, among which are:

Iowa Code Annotated—729.1;
Burns Indiana Statutes Annotated—10-4301;
Pages Revised Ohio Code Annotated—3773-24;
Minnesota Statutes Annotated—Sec. 614.31;
Wisconsin Statutes—Sec. 351.52;
Kentucky Revised Statutes—436.160;
Massachusetts Annotated Laws—C 136 S;
West Virginia 1955 Code—s 6072.

For cases supporting the validity of such an exception, see *Johns v. State*, 78 Ind. 332, 43 Am. Reports, 577, where the court said:

"The statute under immediate mention does not grant immunities to one class of citizens which, upon the same terms, shall not belong to all. The terms upon which the immunity may be enjoyed are granted to all and denied to none. All citizens accepting these terms may claim the immunity. All who observe the seventh day of the week are entitled to the immunity provided. There is nothing restricting any citizen from enjoying it upon the same terms with all his fellow citizens."

Also see *State v. Grabinski*, 33 Wash. 2d 603 and *City of Canton v. Nist*, 9 Ohio St. 439.

For authority holding to the contrary, see *Keslingbury v. Treasurer of City of Plainfield*, 160 Atl. 654.

In the original opinion rendered by the Supreme Court in the *Evanston* case, the court considered the point that the Evanston ordinance did not contain such an exemption and the court indicated that if the ordinance had contained such an exemption, it would be held invalid. However, upon rehearing, the references by the court to this contention were deleted from the opinion and the court in its final opinion asserted that the plaintiffs, most of whom were corporations, had not alleged that they were members of any religious groups that would be affected by the ordinance and therefore they had no standing in court to raise such an objection. In the court's original opinion it cited McQuillin on Municipal Corporations, Vol. 6, page 769, where the rule is stated as follows:

"The general rule is that a Sunday ordinance is not invalid as applied to those whose Sabbath is some day of the week other than

Sunday. If there is to be a cessation from business or labor at any particular time, a day for that purpose must be designated for all, and not one day for some and another day for others, even though the one selected is regarded by the majority of the people as their Sabbath or day of rest. This is true and involves no religious discrimination since the Sunday regulation is based fundamentally on civil and not religious considerations. It is a regulation of business to promote the moral and physical welfare and is valid as an exercise of the police power."

We cannot say with any positive assurance how the Supreme Court would rule if the DuBois amendment providing the exemption as to those observing a Sabbath day other than Sunday were adopted.

Re: Leasing or Selling Real Estate

It has been suggested by the Chicago Home Builders Association that Paragraph A be amended to exempt services that relate to the "exhibit and sale of habitation." If such an amendment is to be made, it should be included in the exemptions contained in Paragraph D which pertains to services and not Paragraph A which pertains to personal property.

Re: Referendum

It has been suggested that the subject matter of the proposed ordinance be submitted to referendum. The City Council cannot submit the ordinance to a referendum under the present laws.

*Re: A Substitute Ordinance to Prohibit Only the Sale of
Automobiles and Furniture*

We have given consideration to the discussions had before the Committee as to the authority to restrict the sale of particular commodities.

In *McKaig v. Kansas City* (1953), 256 SW (2) 815, it was held that a Sunday closing ordinance which excluded all persons engaged in the business of selling all commodities and all merchandise, except automobiles, was invalid, saying:

"There is no reasonable basis for singling out those people who are engaged in the business of selling automobiles and excluding those people who sell the above enumerated articles of merchandise who are permitted to keep open their places of business on Sunday and the six holidays."

In *Re Berman's Petition* (1956), 75 NW (2d) 8, an ordinance of the City of Detroit, making it unlawful for any person "to conduct or engage in the business of selling, renting, leasing or exchanging furniture, including but not limited to televisions and radios, and/or household appliances" on Sunday, was held to be valid.

In the opinion rendered in the *Evanston* case, the Illinois Supreme Court uses the following significant language, (p. 407):

"Sunday ordinances must be based on a reasonable classification, and an ordinance prohibiting the sale of a commodity is not discriminatory against particular dealers who are accorded the same treatment as all other dealers in the commodity."

The court cites McQuillin, Municipal Corporations, Section 24-192, where the author said:

"Certainly, it is not requisite to the validity of Sunday legislation that every activity of people which tends to interfere with or prevent its accomplishment be included. Organic law is satisfied if by the Sunday legislation all those similarly situated are included and none

are omitted whose relationship to the subject matter cannot in reason be distinguished from that of those included. Unless there is an utter lack of basis for the classification, the action taken is not discriminatory in the constitutional sense."

State of North Carolina v. Diamond, 56 N. D. 854.

City of Seattle v. Gervasi, 144 Wash. 429.

While the quotations from the *Evanston* case were made by the court in considering a comprehensive Sunday closing ordinance and the reasonableness of the exemptions contained therein, emphasis must be made on the ruling that "an ordinance prohibiting the sale of a commodity is not discriminatory against particular dealers who are accorded the same treatment as all other dealers in the commodity."

It now appears that if an ordinance prohibits the sale of a commodity general in its scope, it will be held to be valid. An ordinance which prohibits a particular business from operating on Sunday, while other similar businesses are allowed to operate, has been held to be invalid.

From the point of view of enforcement, the passage of an ordinance containing restrictions as to the sale of commodities, at retail or wholesale, as provided in the *Evanston* ordinance would be more effective than passing an ordinance covering every phase of business, industry and services, with many exemptions.

We suggest that a penalty provision be included in whatever ordinance may be passed.

We transmit herewith a form of ordinance that the Supreme Court approved without question.

SURFACE DRAINAGE ON PRIVATE PROPERTY

(No. 12099—Commissioner of Buildings—R. N.—January 8, 1957.)

You asked this department to advise you as to the possibility of invoking provisions other than sections 82-62 and 99-4 of the Municipal Code of Chicago in prosecutions involving surface drainage from one piece of property to another, particularly as regards back yards and sidewalks constructed in back yards.

We have discussed the matter at length with Alderman Cilella with whom the inquiry originated, in an effort to determine the exact nature of the situation with which his inquiry is concerned and the possible extent thereof. We have also carefully studied the sections referred to by you in the light of your statement that your department has "had little success in court with this type of case, the attitude of the court being that an owner should protect himself against surface drainage".

The language of section 82-62 above referred to is clear and unambiguous. It reads, in part, as follows:

"Outside areas other than roof areas may be drained to a sewer and when paved shall be so drained where necessary to avoid the discharge of water onto adjoining premises."

The section is so drawn as to cover two distinct situations; paved areas which are treated secondly, and unpaved areas which are treated initially.

The language employed in connection with paved areas, you will note, is mandatory: " * * * and when paved *shall* be so drained * * *." The language employed in connection with unpaved areas, however, is merely permissive: " * * * *may* be drained * * *". It is thus contemplated that the improvement of one's property must be so accomplished so as not to create an additional burden on adjoining property. However, the question of natural drainage, in the absence of statutory regulation, is a matter of common law right of a private rather than a public nature, and is therefore not a proper subject of municipal regulation unless the condition created is such as to constitute a hazard to the public health or safety, and, therefore, a nuisance. To this end the provisions of sections 82-62 and 99-4 appear to be adequate. If it has been the experience of your department that in the judgment of the court the prosecution thereunder fails, that is a matter which rests with the court. In such case the property owner who feels his property rights are being violated has his remedy in the civil courts.

AUTOMOBILES WITHOUT ENGINE NUMBERS

(No. 12102—Commissioner of Police—A. F. G.—January 21, 1957.)

On January 3, 1957 you wrote as follows:

"I am forwarding a copy of a letter which was addressed to the commanding officer of our Stolen Auto Section by Don Armstrong of the National Automobile Theft Bureau, 175 W. Jackson Blvd. re the 1957 model automobiles and the numbering methods on certain makes.

Will you kindly advise me if the sale of such motor vehicles is legal in the State of Illinois in view of the existence of the Certificate of Title Act of the Illinois State Statutes."

The letter which was attached to yours contained the statement:

"Beginning with the 1957 production, the Chevrolet Motor Company has informed us that they have discontinued the use of a motor number on the block. A number similar to 'F-1001-F' will be stamped on the motor boss, however, it is a production number, it is not cross-indexed and it is of no value whatsoever in the identification of the unit. Therefore, the serial or identification plate located on the left door hinge pillar post is the only public number by which a 1957 model Chevrolet automobile may be identified."

Section 3a of the "Uniform Motor Vehicle Anti Theft Act" requires every manufacturer, importer, or other person who sells or otherwise disposes of a new motor vehicle to a dealer to be used by such dealer for purposes of display and resale and prohibits any dealer from selling or otherwise disposing of a new motor vehicle to a consumer without delivering to such dealer or consumer, as the case may be, a manufacturer's or importer's certificate executed in accordance with the said Act. The form of the said certificate is set up in the Act and has spaces for the insertion of the engine number and serial number. However, following the form is this proviso: "If the motor vehicle has a vehicle identification number, such number may be stated in lieu of the engine and serial number in the above certificate."

In our opinion a motor vehicle which has an identification number or serial number may be legally sold in this State in view of the foregoing proviso. The office of the Secretary of State, which administers the Anti-Theft Act confirms our view and holds that such a motor vehicle is in compliance with the statute.

CIGARETTE VENDING MACHINES IN HOSPITALS

(No. 12114—City Clerk—E. V. H.—March 29, 1957.)

We have reviewed the enclosure with your letter of March 25, 1957, wherein the attorneys for Chicago Wesley Memorial Hospital indicate their opinion that the hospital is a commercial or mercantile establishment within the meaning of Chapter 178-23 of the Municipal Code, so that cigarette vending machines for the use of their employees might legally be installed there.

We understand that the hospital seeks to install two such machines; one at the first floor entrance by the employees' timeclock rack and one in a first-floor room at the nurses' home, 201 E. Delaware Place. We further understand that neither such location is open to the general public and that the machines would be available only to employees and to student nurses, all of whom are adults.

It is unfortunate that neither the hospital nor the nurses' home is a "commercial" or "mercantile" establishment within the language of Chapter 178-23 of the Municipal Code. Therefore, it is our opinion that cigarette vending machines may not be installed in these locations.

It is our opinion that the words "industrial, commercial and mercantile" as used in said ordinance are of no real value in achieving its purpose, which could as well be attained were they omitted. We suggest that consideration be given to amending this section so as to read:

"* * * no cigarette-vending machine shall be installed or used any place except and save only in rooms or areas of establishments to which members of the general public are not invited or do not have access and where such machines shall be available for the use and convenience of the employees of such establishments."

GOING OUT OF BUSINESS SALE—LICENSE REVOCATION

(No. 12125—City Clerk—A. F. G.—June 6, 1957.)

Your letter of June 5, 1957 is as follows:

"On May 24, 1957, application was made to this Office for a 'Going Out of Business Sale' in the name of Stuart's (Signed by Manny Okmin). The application contained an inventory of items on hand.

"Alderman Sperling and a delegation of business men from the area have complained to my office that the license issued pursuant to such application was based on fraud. They have affidavits in which they state that Stuart's was closed from May 8th to May 20th and then an Auction was conducted by an assignee for benefit of creditors. They state that Mr. Okmin purchased the merchandise of Stuart's and then applied to me for a 'Going Out of Business Sale'.

"They state that no suits were sold at the Auction but that 600 suits were listed in the inventory. They state that items listed in the inventory were far in excess of the items actually on hand at the time of the Auction. They further state that since the opening of the 'Going

Out of Business' Sale, additional merchandise has been brought in on at least three occasions. They further state that the former owner of Stuart's, has nothing to do with the 'Going Out of Business' Sale.

"They are requesting me to revoke the license which I issued or treat the same as invalid ab initio as being founded on fraud. Will you please advise me if I have the authority to revoke the license and what procedure I should follow or should be followed to remedy this situation. Inasmuch as the matter is very urgent to the business men in the area, I hope that I can receive an immediate response from you. They have arranged to return to my Office on Thursday, June 6th, 1957, at 2:00 P.M. and I would like to then be in a position to advise them."

In an opinion to the City Clerk dated April 7, 1953, published in full in Vol. 23 of the Opinions of the Corporation Counsel at page 407, in response to his request for an opinion as to whether he has the right to refuse a license to any person who acquires his merchandise for the sole purpose of conducting a "going out of business sale". In this case the applicant claimed he just bought the entire stock of a firm in Chicago for the sole purpose of disposing of the stock by advertising a "Closing Out Sale". In that opinion we said:

"Section 150 of the Act requires the person seeking a license to conduct such a sale to set out in his application under oath among other matters:

* * * an inventory of the goods, wares or merchandise to be sold, why such goods, wares or merchandise are to be sold under such name, why, and in what manner, such name is truthfully descriptive of such sale, * * * from whom the goods, wares or merchandise to be sold were procured by the applicant, the date of so procuring them, and of the delivery thereof to the applicant * * * whereupon such clerk shall issue a license to the person so applying therefor * * *."

"Section 153 of the Act reads in part as follows:

'No person in contemplation of conducting any such liquidation, creditors' removal, closing out, or going out of business sale * * * shall order any goods, wares or merchandise for the purpose of selling them at such sale, and any unusual purchase, or additions to the stock of such goods, wares or merchandise within sixty days before the filing of such application for a license to conduct such a sale, shall be presumptive evidence that such purchases or additions were made in contemplation of such sale and for the purpose of selling them at such sale.'

"While this section may have been intended to deal primarily with the problem of sellers who acquire additional wares to add to existing stocks thereby abusing the privilege and misleading the public, and may not have been intended to cover a situation where a purchase is made of a full stock and the entire business venture is planned as a 'one shot' going out of business sale, there is nothing in the language of the Act which permits construction of this distinction. The language used is broadly phrased and in the absence of judicial construction must be read in accordance with its plain meaning.

"We are therefore of the opinion that a person who acquires his merchandise for the sole purpose of conducting a 'going out of business' sale has made such purchase 'in contemplation' of such sale and would be in violation of the above section.

"The next question presented is whether the City Clerk may refuse to issue a license where the applicant has acquired his merchandise for the sole purpose of conducting such a sale.

"An Act 'to prevent the fraudulent sale and to regulate the sale and advertising for sale of goods, wares and merchandise, and to provide penalties' which had been approved by the state legislature July 7, 1931, was subsequently held invalid by our Supreme Court because it delegated legislative power to the City Clerk to whom wide discretionary power was given. *People v. Yonker*, 351 Ill. 139 (1933).

"The present statute was apparently designed to meet the court's objections to the earlier act. Section 150 quoted above prescribes the steps to be taken by the applicant and enumerates the information he must include and then in setting out the duty of the clerk reads, * * * whereupon such clerk shall issue a license * * *.

"This language when viewed in the light of the history of the act would appear to spell out a mandatory duty which the clerk must follow once the form has been filled out as prescribed by law.

"However, whether a statute is mandatory or directory does not depend upon its form but upon the intention of the legislature, to be ascertained from a consideration of the entire act, its nature, its object, and the consequence that would result from construing it one way or the other. In *re McQuistons Adoption*, 238 Pa. 304, 86 Atl. 205 (1913).

"If the very application form presented to the Clerk contains information showing that the nature of the contemplated sale is such that is prohibited and declared punishable by a subsequent section of the same act, violence would be done to the 'entire act, its nature, its object,' to permit such a license to issue and the sale to be held. The purpose of the Act is to protect the public. This can be done most effectively at the point of issuing the license and the legislature may be regarded as having so intended by the very fact of its establishment of a licensing requirement.

"It is our opinion that you, as City Clerk, may refuse a license to this applicant and to any person who acquires his merchandise for the sole purpose of conducting a 'going out of business sale'."

Your letter does not state that Mr. Manny Okmin was in business at the time he applied for a license to conduct a "Going Out of Business Sale". Certainly if he was not in business he could not very well go out of business.

While the statute does not expressly authorize the City Clerk to revoke a license already issued, if the Clerk finds that the license has been issued through misrepresentation or has been improvidently issued to conduct a sale apparently in violation of the statute, he has in our opinion the right to revoke the license.

SALES OF GOODS FROM DISTRESSED SOURCE

(No. 12133—City Clerk—A. F. G.—July 3, 1957.)

Your letter of July 1, 1957 is as follows:

"I enclose herewith a copy of a letter received from the Chicago Better Business Bureau.

I find nothing in section 1 of the Fraudulent Sales Act (Ill. Rev. Stat. 1955, chap. 121½, Par. 149) which would permit a sale under the terms of the Act merely because the merchandise was obtained from another source.

"Under an old opinion issued by your office (Vol. 18, Opinions of the Corporation Counsel Page 550) it would appear that a license might not be required if the merchandise was obtained from other sources and if the advertising in connection therewith specifically described the fact that the same was from other sources. This opinion, however, related to the 1931 Fraudulent Sales Act which was held to be unconstitutional (*People v. Yonker*, 351 Ill. 139).

"I would appreciate your opinion on this matter so that I can properly answer the letter of the Chicago Better Business Bureau."

The letter of the Chicago Better Business Bureau, signed by A. B. Johnson, Vice President, is in part as follows:

"It is my understanding that your office would not consider a license necessary to conduct or advertise the type of sale named in Section 149 of the Fraudulent Sales Act, if the advertiser made it clear the merchandise being offered was obtained from another source.

"For example, we understand that if store 'A' purchased salvage merchandise from store 'B', he could advertise it as such without obtaining a license, provided the advertisement plainly stated such merchandise had been obtained from store 'B' and that he (store 'A') was not himself in such distressed condition.

"By way of further identifying the type of transaction to which I refer, let us suppose that Johnston's Dry Goods Store in Des Moines, Ia. suffered a fire. Jones Department Store in Chicago purchased the salvagable stock thereof and advertised it in the local newspapers over its own firm name as stock obtained from the fire sale of Johnston's Dry Goods Store in Des Moines, Ia.

"It would be appreciated if you would kindly advise us if our understanding that license would not be required in this instance is accurate."

In the opinion dated December 16, 1931 and reported in Vol. 18 of the Opinions of the Corporation Counsel at p. 550, we held that only those persons are required to be licensed, who advertise, represent, or hold out that any sale of goods, wares and merchandise is of the specific kind or kinds mentioned in section 1 of the Act, and the Act does not require persons to be licensed who merely buy goods at auction, bankruptcy, etc. sales and then take the goods to their own establishments and resell the same to their customers. In so doing, we held in our opinion, that such person might properly advertise that the goods in question had been purchased at auction, bankruptcy, etc. sales and as a consequence were being sold at reduced prices. In such case the dealer is not conducting an insurance, bankruptcy etc. sale and therefore not required to be licensed under the Act.

It is true that the Act of 1931 on which the foregoing opinion was based was subsequently held invalid by our Supreme Court because it delegated legislative power to the City Clerk to whom wide discretionary power was given. *People v. Yonker*, 351 Ill. 139 (1933). The present statute was apparently designed to meet the Court's objection to the earlier act.

We think the opinion of 1931 is applicable to the present Fraudulent Sales Act, and in our opinion no license would be required in the two cases referred to in Mr. Johnston's letter.

INSPECTION FEE FOR HOSPITAL

(No. 12185—Commissioner of Buildings—R. N.—November 26, 1957.)

In reply to your inquiry of November 19, 1957, as to whether Weiss Memorial Hospital is exempt from payment of elevator inspection fees, which exemption is claimed by virtue of an ordinance passed on April 16, 1952, we submit the following:

1. The ordinance of April 16, 1952 above referred to, photostatic copy of which was submitted by Weiss Memorial Hospital as basis for its claim for exemption from payment of elevator inspection fees, specifically provides for the issuance of "all necessary permits and licenses, free of charge * * * for the erection and maintenance" of the hospital building. You will note that no mention is made of inspection fees. The specific enumeration of the given subjects of permit and license fees excludes the presumption of the intended inclusion of such further subjects as inspection fees, etc. It is our opinion that the ordinance does not provide for any exemption concerning inspection fees.
2. It is possible that some contention may be made that the hospital is exempt under Section 47-7 of the Code. An identical situation arose in 1943 on a similar claim by Michael Reese Hospital. This department then determined that elevator inspection fees were not a subject of exemption under our ordinances. The opinion, dated August 26, 1943, is printed in full in Volume 22 of Opinions of the Corporation Counsel, at page 354.

DUTCH ELM DISEASE—NUISANCE

(No. 12252—Committee on Forestry and Recreation—R. N.—October 6, 1958.)

The proposed ordinance to declare as a public nuisance all trees affected with Dutch elm disease and to authorize the city forester to remove such trees located on private property, was drafted by this department at the request of Alderman Hoellen.

In our opinion the city has ample authority to enact such an ordinance under section 23-61 of the Revised Cities and Villages Act. By that section the corporate authorities are granted the broad power "to define, prevent and abate nuisances." The courts have uniformly held that under such authority the judgment of the court will not be substituted for the judgment of the legislative authority in declaring what shall be deemed a nuisance.

There are some things which in their nature are nuisances, which the law recognizes as such. There are others which may or may not be so, their character depending on circumstances. Joyce on Nuisances (p. 2) defines a nuisance as follows:

"A nuisance is anything that works or causes injury, damage, hurt, inconvenience, annoyance or discomfort to one in the legitimate enjoyment of his reasonable rights of person or property" and "may exist not only by reason of doing an act, but also by omitting to perform a duty."

The question, when a thing may or may not be a nuisance, is one of fact and not of law. In the light of all of the present research and publicity in the field of Dutch elm disease as an international menace, we feel that there would be no division of opinion concerning its character as a nuisance, and that the proposed ordinance designed to cope with the problem would be a valid exercise of authority by the City of Chicago.

COIN-REMOTE CONTROL VENDING MACHINE

(No. 12270—City Collector—J. F. G.—February 9, 1959.)

We have your letter of January 29, 1959, with enclosure of a letter of Chicago Association Tobacco Distributors dated January 16, 1959, which describes a "coin-remote control cigarette vending machine." You request an opinion on the legality of the installation and use of the device described in the sale of cigarettes where it is readily accessible to the general public.

In our opinion, the definition of "cigarette vending machine" in Section 178-20 covers the coin-remote control device described. There is nothing in the ordinance to indicate that the coin box must be upon or within the vending machine. The additional act of pressing a button to activate the cigarette vending machine does not alter its character as a device "for retail sale of cigarettes, the operation of which is governed or controlled by the deposit of a coin or token."

At the time the code was amended to permit sale of cigarettes through vending machines, it was clearly intended as an economic measure for employees' rest periods in commercial and industrial plants. Before the amendment, cigarettes were dispensed illegally without license in some such establishments. The amendment was highly controversial and the installation of "cigarette vending machines," as defined in the ordinance, were limited to establishments where "the general public are not invited or do not have access and where such machines shall be available for the use and convenience of the employees of such establishments" (Section 178-23).

In an opinion dated April 24, 1956, we advised you that a machine activated by remote control without deposit of a coin, is not subject to the provisions relating to cigarette vending machines and therefore installation of such device was not prohibited in locations to which the general public has free access.

The difference between the approved device activated by remote control and the "coin-remote control device" described by you is in the control of the storekeeper alone without intervention of the deposit of a coin. The difference may be a highly technical or strict construction of the language of the ordinance defining a "cigarette vending machine." Both devices seem to be equally effective in placing the responsibility upon the licensee for selling cigarettes to minors, which was the principal objection to the use of cigarette vending machines. However, it is for the city council to determine, by ordinance, whether the definition of "cigarette vending machines" should be modified to exclude those activated by deposit of a coin in a remote receptacle accessible only to the storekeeper.

Ed. Note: See *Pressley v. City of Chicago*, 26 Ill. App. 2d 283.

LIQUOR AT PARTY IN DRY DISTRICT

(No. 12271—Commissioner of Police—H. A. I.—February 13, 1959.)

Recently this office received an inquiry from the Caldwell Post of the American Legion located at 6038 N. Cicero Avenue in an area voted dry, in which our opinion was requested as to whether the Post could rent out its facilities to persons conducting wedding parties where alcoholic liquor would be dispensed to the wedding guests and whether the Post could legally enter into such a rental agreement without being in violation of the local option provisions of the Liquor Act.

The Post emphasized that it would have no participation in either the purchase or delivery of the liquor which would be dispensed at such wedding parties.

The Post advised us that it had been notified by the Commanding Officer of the local police district that he would not sanction or permit any dispensing of liquor in any of the Post's facilities in view of the fact that the area had been voted dry.

Upon receiving this inquiry and after making our own independent research of the legal questions raised, we concluded that this precise question has not been passed upon by any Illinois court. We thereupon addressed the following communication to the Illinois Liquor Control Commission on January 29, 1959:

"This office has recently received an inquiry as to whether a person who rents a hall for a wedding party in an area within the City of Chicago which has been voted dry in a local option referendum and who proposes to serve and dispense alcoholic beverages to his wedding guests, may do so without being in violation of the local option provisions of the Illinois Liquor Control Act.

"This inquiry raises a question of interpretation of Section 12 of Article IX of the Illinois Liquor Act as to whether such a proposal would be considered a shift or device to evade the local option provisions of the State Act.

"So far as we have been able to determine, this particular question has never been passed upon by the Illinois courts or the Attorney General of this State. In the absence of any such decision or opinion, we would be largely guided and governed by the views of the Illinois Liquor Commission on such a particular question.

"We would, therefore, welcome any expression from your Commission as to its position on the proposal now before us."

On February 2, 1959, this office received the following response from the Illinois Liquor Commission:

"With reference to your inquiry of January 29, 1959, it would appear from the facts therein stated that there would be no violation or circumvention of the Illinois Liquor Control Act, and the local option provisions thereof."

We believe that our communication and the answer from the Illinois Liquor Commission should serve as a guide to your office whenever this question may present itself.

RED FLASHER LIGHT ON PRIVATE AMBULANCE

(No. 12276—Commissioner of Police—A. F. G.—April 20, 1959.)

On April 15, 1959 you wrote as follows:

"The Allport Medical Center, Dr. Martin L. Gecht, 1239 W. 18th Street, state they have an emergency vehicle used to transport sick or injured persons, and inquire if they have the right to have a red flasher light on top of their vehicle.

Please advise us as to this inquiry."

Attached to your letter was a communication from the Medical Center which reads as follows:

"The Allport Medical Center has an emergency vehicle which is used to pick-up ill or injured employees of local industrial concerns, and transport these persons to this center or to a hospital for further care. It has been brought to our attention, that we are probably qualified to use the red flasher light on top of our vehicle, to indicate the nature of its use. Would you be kind enough to clarify this matter for me and direct me to the proper codes and regulations covering its use. I would also appreciate your opinion, as to whether we are eligible to use this equipment."

Practically all of the provisions of law regulating the operation and equipment of motor vehicles are to be found in the "Uniform Act Regulating Traffic on Highways" (Paragraphs 98 to 239 inclusive, Chapter 95½, Ill. Rev. Stats. 1957). Paragraph 210 of that chapter prohibits the use of flasher lights except on emergency vehicles. Paragraph 99 (d) of that chapter defines "authorized emergency vehicles" as follows:

"(d) Authorized emergency vehicle. Police vehicles, vehicles of the fire department and ambulances and emergency vehicles of municipal departments or public service corporations as are designated or authorized by proper local authorities."

It will be noted that ambulances of private hospitals or medical centers are not included in the foregoing definition and in our opinion the use of flasher lights on privately owned ambulances is prohibited by law and their use would constitute a violation thereof.

SAFETY CLEARANCE FOR TANKS

(No. 12361—Alderman, 33rd Ward—J. C. M.—December 12, 1960.)

The application for a permit for a flammable liquid tank to be installed at 3601 N. California Avenue has been referred to this office by Mayor Richard J. Daley.

We have examined the application and are of the opinion that a permit cannot issue. Section 127-52 of the Municipal Code of Chicago provides in part as follows:

"No tank, container, pipe or other equipment for the storage and handling of flammable liquids shall be installed within 200 feet of the nearest boundary of any lot or plot of ground used for a school, hospital, church or theatre."

And Section 40-8 of the Code provides in part as follows:

"No such tank shall be installed in any lot or plot of ground where any of the boundaries of such lot or plot of ground are within 200 feet of the nearest boundary of any lot or plot of ground used for a school, hospital, church or theatre."

These provisions of the ordinance were declared to be legal and controlling in *Bulk Petroleum Corp. v. City of Chicago*, 18 Ill. 2d, 383. In that case the plaintiff sought to get around the ordinance by placing tanks for flammable liquid at the northwest corner of its lot, which was more than 200 feet away from the sanitarium. The court held that the plaintiff could not avoid the provisions of the ordinance as the lot line of the property was within 200 feet of the sanitarium.

We return herewith the diagram and also Check No. 5971 of Kez Construction Company, Inc., dated September 20, 1960, payable to the City Collector in the amount of \$17.50.

CHAPTER VI—LICENSES AND PERMITS

A. LIQUOR LICENSES

MEANING OF CHURCH

(No. 11817—Commissioner of Police—C. P. H.—May 18, 1954.)

We have your letter of May 14, 1954, transmitting the application filed April 28, 1954, by one Helen Dunn for a Retail Liquor Dealer's License for the first floor of the premises located at 2152 W. Madison Street. It appears that these premises are within 100 feet of the Calvary Bible Church located at 2150 W. Madison Street.

The first question presented for our determination, is whether or not a liquor license may properly be issued for the premises designated in the application. Under the provisions of Section 8 of Article VI of the Liquor Control Law of the State of Illinois (par. 127, chap. 43, Ill. Rev. Stat. 1953), no license shall be issued for the sale at retail of any alcoholic liquor within 100 feet of any church. This section, however, further provides that this prohibition shall not apply "to the renewal of a license for the sale at retail of alcoholic liquor on a premises within 100 feet of any church where such church has been established within such 100 feet since the issuance of the original license." The application shows that the Calvary Bible Church has been located at 2150 W. Madison Street for a long period of time prior to April 28, 1954, the date on which the applicant filed her application for a liquor license. Furthermore, the Act expressly exempts from its provisions the "renewal" of a license for the sale at retail of alcoholic liquor on premises within 100 feet of any church. Since the application of Helen Dunn is for an "original" license and not a "renewal" license, and the church in question having been in existence within 100 feet of the premises for which the license is sought, it necessarily follows that the exemption provisions of Section 8 are not applicable here.

The next question presented for our determination, is whether or not the Calvary Bible Church is within the meaning of the word "church" as used in Section 8 of the Act. This church is operated and conducted by Mrs. Vera Stephens, Pastor, who conducts services on the premises on weekdays from 7:30 p.m. to 9:00 p.m., and services on Sunday from 9:00 a.m. to 12:30 p.m. The church at 2150 W. Madison Street is located on the first floor of a two and three story brick store and apartment building.

The courts of review of this State have not defined the word "church" as used in Section 8 of the Act. However, the question of what is a church has been passed upon by the courts and in opinions of the Corporation Counsel.

In an opinion of the Corporation Counsel, addressed to the City Collector under date of May 18, 1912, Opinions of the Corporation Counsel, Volume VI, page 831, the meaning of the word "church" as used in the City's ordinance prohibiting the establishment of junk yards within 400 feet of any church was under consideration. It was there stated, at page 832, as follows:

"The word 'church' may be used as signifying a society for religious worship, also as meaning an edifice consecrated to religion. As used in the ordinance, it has reference to the church edifice."

In another opinion of the Corporation Counsel, dated July 19, 1951, we again had under consideration the meaning of the word "church" as used in Section 8 of the Act. In that case, it appeared that the Washington Park Unit of the Chicago Company of Jehovah's Witnesses maintained a church and school on the second floor of the building located at 733 E. 63rd Street. The building was a two story loft building with stores located on the first floor. We there stated that the building "is not a church or school within the meaning of Section 8 of the Act."

In *People v. Dalton*, 30 N. Y. Suppl. 407, it was held that a building in which the first floor was used for religious meetings and the rest of the building for offices of directors, physicians and others, the whole constituting a mission, but not connected with any church society is not a church within the law forbidding the issuance of a license to sell liquor within a certain distance of a building used as a church. In *State v. Midgett*, 85 N. C. 538, the court stated that there is a distinction between "church" and "place of worship" which is recognized by law, and that a statute, which includes a "church or place appointed for divine worship" is broader than one that relates to "church". In *Howell v. City of Philadelphia*, 8 Phil. 280, the question involved was whether a church edifice purchased by private parties was a "church" within the statute. It was stated that a "church" is a structure dedicated as a regular place of religious worship.

In the appeal of Manheim Township Post No. 664 of the American Legion to the Court of Quarter Sessions of Lancaster County, Pa., 51 Lancaster Law Review, 287 (1949), the court held that the holding of regular church services in the basement of a dwelling house does not make the building a "church" within the meaning of the Liquor Control Act which gives the Liquor Control Board power to refuse a license for a premises within 300 feet of a church. The court stated that the legislature used the word "church" in this connection in the sense of a building or edifice instead of a congregation. In the case of *In Re Finley*, 110 N. Y. S. 71 (1908), the first floor of a frame dwelling house located in the suburbs was used for church services and a Sunday school, while the pastor and his family lived on the second floor. The third floor was occupied by another family. The court held that under the circumstances the building was not a church under the provisions of the liquor law. In *George, et al. v. Board of Excise of City of Elizabeth*, 73 N. J. Law 366 (1906), 63 Atl. 870, it was decided that a building used in part for religious purposes and in part as a dwelling did not constitute a church within the meaning of the Liquor Act prohibiting the sale of liquor within 200 feet of a church.

From an examination of your communication, the license application, the license officer's report and the maps of the Zoning Board of Appeals, it is apparent that the church is located in a two and three story store and apartment building. The church is not located in a building used exclusively for church purposes. In view of all of the facts and circumstances and the reasoning employed in the cases cited, it is our view that the Calvary Bible Church at 2150 W. Madison Street located within 100 feet of the premises for which the license is sought is not a church within the meaning of Section 8 of the Liquor Control Law of the State of Illinois. It is, therefore, our opinion that a license may properly be issued to the applicant for the premises designated in the application provided the applicant and the premises comply in all other respects with the provisions of the Ordinance of the City of Chicago and the statutes of the State of Illinois regulating the sale at retail of alcoholic liquors.

SPOUSE OF AN INELIGIBLE LICENSEE

(No. 11833—P. P.—H. A. I.—June 30, 1954.)

Your recent communication addressed to the Mayor of the City of Chicago has been forwarded to this department for a reply.

Overshadowing the specific points discussed are the broader implications inherent in the question raised in your letter as to whether a revocation of a liquor license of one person is grounds for a refusal of a license to the spouse of such person. Since this is a problem frequently confronting liquor licensing authorities we cite the excellent statement of the law relating thereto found in the case of *State ex rel. Nixon v. McCanless* (Tenn.), 141 S. W. 2d 885 (1940).

In that case two men had operated a liquor business but their license had been revoked. Their wives then made application for a license to conduct the same business at the same location and with substantially the same stock of liquors which were on hand at the time of the revocation of the license. The wives had not previously been with the business and knew nothing about the liquor business. The court held that the licensing authority had properly refused to grant a license since he had a large discretion under the circumstances and it appeared probable that the husbands who would continue to work on the premises at least part of the time would dominate the licensees so that in effect persons whose license had been revoked would continue the business. The court stated (P. 885) as follows:

"Upon the foregoing facts we think the Commissioner was justified in concluding that this was a subterfuge by which the husbands of relators were endeavoring to continue the business by operating it in the name of their wives. In cases of this character the licensing authorities are vested with a large discretion in issuing licenses, and their decisions will not be interfered with unless it clearly appears that they have acted arbitrarily or illegally. * * * When the relationship of the parties is considered in connection with the plight of the husbands of relators in having their license revoked when they had a stock of liquors on hand and a lease on the building in which they were doing business which did not expire until sometime in 1941, the mind of any rationally minded person would naturally conclude that this is, in effect, an attempt on the part of the husbands of the relators to do indirectly what they cannot do directly. In theory at least, and most likely in fact, in this particular case there is a unity between these consorts, the wives being under the dominion and control of their husbands. * * *

"A case very much in point is that of *Wilks v. Liquor Control Commission* 1937, 122 Conn. 443, 190 A. 262, 263. In that case the plaintiff, Mrs. Wilks, owned a building in the industrial section of Bridgeport, Connecticut. In 1935 the husband of plaintiff applied for a restaurant permit which was refused by the Liquor Control Commission upon the ground that between 1920 and 1930 he had been convicted six times for violating the prohibition law. The husband thereupon withdrew his application and an application was filed by the wife. The Commission also denied her application upon the ground that she was an unsuitable person in view of the reputation of her husband. Upon appeal, the wife established, as in the case at bar, that she satisfied all the requirements of the law, and contended that the liquor law did not warrant the conclusion that a wife is an unsuitable person because of the employment of her husband upon the premises. In affirming the action of the Commission, it was said: 'It is self-evident that a person suitable per se to receive a permit may be rendered an unsuitable person, if, for example, he is completely subject to the

domination of another who is himself an unsuitable person, in operating under it. The same is true of a person suitable to receive a permit, who in the operation under it becomes a permittee in name only in order to enable the real party in interest who is an unsuitable person in fact to control and carry on the business for himself. Therefore, where the Commission has ground for believing that an applicant, though himself a suitable person, will be rendered an unsuitable permittee through either the domination, or the exclusive operating interest, or both, of another who is unsuitable, it can with reason deny the application. So it might in the exercise of its discretion hold one to be unsuitable as a permittee who employs a person in the active conduct of the business whose reputation is such as to make it likely that he will become a party to violations of the law'."

From these cited cases it will appear that the license authorities in the light of all the surrounding facts and circumstances would have been entirely justified in invoking these principles, as the grounds for revoking your liquor license.

Since you chose not to file an appeal from the order of revocation of your license at 5214 N. Leclaire Avenue to the License Appeal Commission, within 20 days after revocation, with which procedure you were entirely familiar, you thereby waived your right to an administrative or judicial review to determine the propriety of the Mayor's order.

Answering your request therefore, whether you may file an application for a liquor license at 5214 N. Leclaire Avenue after a lapse of one year from June 28, 1953, we must advise you that you are no longer eligible to make application for a liquor license in the State of Illinois being controlled by the provisions of Section 7, paragraph 120 of the Illinois Dram Shop Act, which provides as follows:

"Persons ineligible to license. No license of any kind issued by the State Commission or any Local Commission should be issued to:

(7) A person whose license issued under this Act has been revoked for cause;"

SALE OF LIQUOR AT AIRPORT

(No. 11853—Commissioner of Public Works—J. R. B.—September 17, 1954.)

In your letter of August 20, 1954, you request advice as to what steps are necessary to be taken to allow restaurant concessionaires on City owned and operated airports to sell alcoholic beverages.

Article VI, Section 11 of the Liquor Control Act of the State of Illinois provides:

"No alcoholic liquors shall be sold or delivered in any building belonging to or under the control of the State or any political subdivision thereof; provided, that beer may be sold in any building belonging to or under the control of any city, village or incorporated town where more than seventy-five per cent of the physical properties of such building is used for commercial or recreational purposes, and said building is located upon a pier extending into or over the waters of a navigable lake; and provided further that beer may be sold in buildings in parks under the control of the State Department of Public Works and Buildings, when written consent to the issuance of such a license to sell beer in such buildings is filed with the commission by the State Department of Public Works and Buildings. Nothing in this Section shall preclude

the sale or delivery of beer at a State or County fair or city fair in any otherwise lawful manner. No person shall furnish or suffer to be furnished any alcoholic liquors to any prisoner confined in any jail, reformatory, prison or house of correction, except upon a physician's prescription for medicinal purposes."

In order to allow restaurant concessionaires on City owned and operated airports to sell alcoholic beverages, the above mentioned section of the Liquor Control Act of the State of Illinois would have to be amended to permit restaurant concessionaires on City owned and operated airports to sell alcoholic beverages.

WITHIN ONE HUNDRED FEET OF A NURSING HOME

(No. 11866—Commissioner of Police—H. A. I.—November 15, 1954.)

We have your communication of October 28, 1954, advising us that you have on file applications for retail liquor licenses of Anton Britvich for the premises at 11836 S. Western Avenue and Joseph M. Fogarty for the premises at 11852 S. Western Avenue, Chicago, Illinois. You further advise that an investigating officer, in both instances, reports that both locations are within one hundred feet of the Burke Nursing Home, 11840 S. Western Avenue.

You refer us to Question No. 2 on the Police Department Report on retail liquor license application form, which reads "Is location within 100 feet of any church, school, hospital, home for aged or indigent persons or for veterans, their wives or children, or any military or naval station".

You conclude by requesting our opinion "as to whether or not a Nursing Home is to be construed as premises as set forth in Question No. 2 on the Police Department Report".

Section 8 of Article VI of the Illinois Liquor Control Act, Chapter 43 of the Illinois Revised Statutes of 1953, from which Question No. 2 on the police department questionnaire has been taken, reads in part as follows:

"No license shall be issued for the sale at retail of any alcoholic liquor within 100 feet of any church, school, hospital, home for aged or indigent persons or for veterans, their wives or children or any military or naval station; provided, that this prohibition shall not apply to hotels offering restaurant service, regularly organized clubs, or to restaurants, food shops or other places where sale of alcoholic liquors is not the principal business carried on, if such place of business so exempted shall have been established for such purposes prior to the taking effect of this Act; nor to the renewal of a license for the sale at retail of alcoholic liquor on premises within 100 feet of any church where such church has been established within such 100 feet since the issuance of the original license. * * *

The question presented for our consideration here is whether a Nursing Home, not being specifically mentioned in the Act, is entitled to the protection of Section 8 of Article VI of the Illinois Liquor Control Act and whether we can construe the statute to include such an institution.

Earlier we were presented with the problem of construing the particular section of the Act when requested by the Mayor's office to render an opinion as to whether a retail liquor license should issue to premises located within one hundred feet of a "day nursery", since this institution is not explicitly enumerated in this statute. After carefully analyzing Section 8, above quoted, this office, in opinions of the Corporation Counsel and Assistants, Opinion No. 10994, Volume 22, page 243, concluded that it would not be improper to issue a license under those circumstances and stated as follows:

"It seems obvious that had the legislature intended to bring Day Nurseries within the protective provisions of Section 8 of Article VI of the Liquor Control law, it would have employed the words 'Day Nursery', and that it would be an unwarranted interpretation of the word 'school' to say that a Day Nursery was a school within the intent and meaning of the word school as used by the legislature."

Our problem here, while identical in many respects to that considered in the above opinion, presents some additional aspects. The institution known as a "nursing home" is of comparative recent origin and the term was apparently not widely used at the time of the adoption of the dram shop act. For a definition of "nursing home" we must look elsewhere. Paragraph 35.16 of chap. 111½ of the Ill. Rev. Stats. (an Act entitled "Act Governing the Operation of Nursing Homes and Homes for the Aged", approved July 17, 1945, as amended, 1953) defines a "nursing home" as follows:

"For the purposes of this Act, unless the context otherwise requires:

'Nursing home' or 'home for the aged' means a private home, institution, building, residence, or other place, whether operated for profit or not, and including a county home for the infirm and chronically ill operated pursuant to Sections 4-17 to 4-24, inclusive of the 'Public Assistance Code of Illinois', approved August 4, 1949, as amended, or any similar institution operated by a political sub-division of the State of Illinois which provides, through its ownership or management, maintenance, personal care, or nursing for three or more persons who, by reason of illness or physical infirmity, are unable properly to care for themselves, or provides sheltered care to three or more aged persons not related to the operator by blood or marriage but who need such shelter. The term does not include the following:

(a) a home, institution, or other place operated by the federal government or agency thereof, or by the State of Illinois;

(b) a hospital, sanitarium, or other institution whose principal activity or business is the care and treatment of persons suffering from mental or nervous diseases;

(c) a hospital, sanitarium, or other institution whose principal activity or business is the diagnosis, care, and treatment of human illness through the maintenance and operation of organized facilities therefor;

(d) any child welfare agency, maternity hospital, or lying-in home required to be licensed by the State of Illinois. * * *

The term "indigent persons" is not defined in the dram shop act or anywhere else in the statute, and accordingly we have adopted the definition found in Webster's New International Dictionary, 2nd edition, unabridged, which defines "indigent" as follows:

"destitute of property or means of comfortable subsistence; needy; in want; necessitous."

If you find upon investigation that the home in question is actually that type of institution which "provides sheltered care for three or more *aged persons* not related to the operator by blood or marriage, but who need such shelter" (italics ours), you may properly conclude that such a home is in fact a "home for the aged" and, as such, is entitled to the protection of Section 8 of the Liquor Control Act, notwithstanding that it may designate itself as a nursing home or by an other terminology.

In the event your investigation discloses that this institution is in fact a home for the indigent as defined above, you will likewise regard such institution as entitled to the protection of Section 8, even though such institution has designated itself as a nursing home.

If, on the other hand, you find that the home in question does not come within the above two categories mentioned but "*provides personal care or nursing for three or more persons, who, by reason of illness or physical infirmity are unable to care for themselves*", you must conclude that such a home is in fact a nursing home and not a "home for the aged or indigent persons". (Italics ours.)

In the event of the latter contingency, we would be compelled to adopt the reasoning set forth in our earlier opinion referred to above. Were we to bring "nursing homes" within the protective provisions of the Illinois Liquor Control Act, we would be extending the excluded institutions by unwarranted interpretation and this we would be reluctant to do. Had the legislature intended to include "nursing homes", it could have specifically mentioned the latter amongst the enumerated institutions in the original enactment or by subsequent amendment.

Under the circumstances, we must advise you that if the applicants are otherwise qualified, it would be improper to refuse them retail liquor licenses because their premises are within one hundred feet of a Nursing Home.

LICENSE FOR A UNION LOCAL

(No. 11898—Commissioner of Police—E. W. P.—April 18, 1955.)

We have your letter of February 8, 1955, transmitting an application of the Metal Processors Union, A. F. of L. for a license to sell alcoholic liquor to its members only on the first floor of the premises located at 1950-52 W. Erie Street. You request our opinion as to whether or not such a license may properly be issued to the applicant for these premises.

The City Council passed an ordinance on August 4, 1950, appearing in the Journal of Proceedings of the City Council of that date at page 6751, amending Section 147-4 of the Municipal Code of Chicago by adding thereto the following:

"Provided, that in the case of a lodge or local chapter or corresponding unit of any fraternal order or other association of a kindred nature which is national or state-wide in organization or character, or any body, the membership of which is comprised of persons who have served in the military or naval services of the United States, and which are organized under the 'General Not for Profit Corporation Act' of the State of Illinois and which has been in active and continuous existence for at least three years prior to the date on which application for license is filed and which in good faith maintains a membership roll during said three-year period and has, at the time application is filed, more than fifty members with dues paid to date and which is the owner, licensee, or occupant of an establishment operated solely for objects of a national or state-wide social, patriotic, recreational, benevolent purpose or the like, but not for pecuniary gain or profit, and the property as well as the advantage of which belong to all the members thereof, the fee for a city retail liquor dealer's license for the sale to members only shall be fifty dollars for the whole or any portion of the license period for which application is made."

For the purpose of showing that it comes within the purview of the above ordinance, the applicant has submitted in support of its application an affidavit signed by Victor J. Failla as President of Metal Processor's Union, A. F. L. and Mr. Forrest E. Lindsey, Secretary of the Union, setting forth that the applicant, the Metal Processors' Union, is a local union affiliated with the American Federation of Labor, which is national and state-wide in

character, that Metal Processor's Union was organized under the "General Not for Pecuniary Corporation Act" in March 1951; that the corporation has been in active and continued existence for at least three years prior to the date on which the application for license was filed; that the organization maintains a membership roll and has so maintained it for the past three-year period before the application was filed showing a membership of more than fifty members with dues paid to date and that the said corporation is operated solely for objects of a national and state-wide social, patriotic, recreational, benevolent purpose or the like, but not for pecuniary gain or profit, and that the property of the applicant organization as well as the advantages thereof belong to all of the members.

In view of these facts, it appears that the applicant is qualified to receive a license provided for in the Ordinance referred to above.

Section 20 of Article VI of the Illinois Liquor Control Law provides as follows:

"In premises upon which the sale of alcoholic liquor for consumption upon the premises is licensed (other than as a restaurant, hotel, club or any bowling alley other than one situated on the first, or ground floor) no screen, blind, curtain, partition, article or thing, shall be permitted in the windows or upon the doors of such licensed premises nor inside such premises, which shall prevent a clear view into the interior of such licensed premises from the street, road or sidewalk at all times, and no booth, screen, partition, or other obstruction nor any arrangements of lights or lighting shall be permitted in or about the interior of such licensed premises which shall prevent a full view of the entire interior of such premises from the street, road or sidewalk, and said premises must be so located that there shall be a full view of the entire interior of such premises from the street, road or sidewalk.

* * *

Your report of the Police Department discloses that there are no obstructions which prevent a clear view into the interior from the street or sidewalk, and that the premises which is to be the first floor of the building at 1950-52 W. Erie Street are so located that there is a full view of the entire interior from the street or sidewalk.

It is, therefore, our opinion, based upon the information contained in the application and affidavit and the Police Report that the Metal Processor's Union, A. F. L., is qualified under Section 147-4 of the Code as amended for a license to sell alcoholic liquor to its members only on the premises located at 1950-52 W. Erie Street.

We return herewith the application referred to herein together with the affidavit and police report attached thereto.

PROCEDURE FOR REVOCATION HEARING

(No. 11931—Mayor—H. A. I.—July 25, 1955.)

House Bill No. 915, passed by the General Assembly and approved by the Governor, amends Section 5 and Sections 8 and 8A of Article VII of the Illinois Liquor Control Act by providing, in addition to the power of revocation, the power to suspend retail liquor licenses and prescribing the procedure to be followed by the local liquor control commissioner in revoking or suspending such licenses.

An analysis of the amendments disclosed a number of innovations and departures from the original act which we shall point out in this memorandum together with our recommendations for steps to be taken in carrying

out the added duties and functions imposed upon you as the local liquor control commissioner of the City of Chicago.

Heretofore under the original act, the Mayor was vested solely with the power of revoking a retail liquor license. Under the amendment he is given an additional alternative of suspending such license and may now either revoke or suspend any license if he determines that the licensee has violated any of the provisions of the state liquor act or any ordinance of the city, pertaining to the licensing and regulation of the sale of alcoholic liquor.

Except in case of emergency, the act now provides that,

"no such license shall be so revoked or suspended except after a public hearing by the local liquor control commissioner with a three (3) day written notice to the licensee affording licensee an opportunity to appear and defend."

An emergency is described as a situation wherein,

"the local liquor control commissioner has reason to believe that any continued operation of a particular licensed premises will immediately threaten the welfare of the community."

Under such circumstances, the Mayor may upon the issuance of a written order stating the reason for such conclusion and without notice or hearing order the licensed premises closed for not more than seven (7) days giving the licensee an opportunity to be heard during that period. (The seven days.)

The amendment further provides that within ten (10) days after the prescribed hearing, if the Mayor determines after the hearing that the license should be revoked or suspended he should issue a written order of revocation or suspension stating the reasons for such determination and serve a copy thereof within the ten (10) days upon the said licensee. The licensee upon receipt of such order shall have the privilege of appealing the Mayor's ruling within twenty (20) days after receipt of such written order to the license appeal commission and upon the filing of such appeal, the licensee,

"may reopen his place of business until such time as the license appeal commission shall render a decision either sustaining the order of the local liquor control commissioner or reversing said order."

The practical effect of this amendment is that any action of liquor control commissioner in revoking or suspending a liquor license except these emergency situations referred to above does not become effective, in the event of an appeal, until such time as the commission might sustain such action of the Mayor.

Since the requirement that the licensee be granted a public hearing by the Mayor and an opportunity to appear and defend is a new departure we anticipate that questions may arise as to the character and scope of such hearing and whether the practice heretofore followed by the Mayor's Office of granting informal interviews to licensees preliminary to final revocation action will satisfy the legislative mandate.

It seems clear to us that the type of hearing contemplated by the legislature is obviously that type of hearing now provided for in Section 6 of Article VII of the liquor act dealing with the procedure to be followed by the Illinois State Liquor Control Commission, in conducting hearings to revoke that category of licensees such as manufacturers, distributors or importing distributors, etc. not licensed by municipalities. This can be readily ascertained when reading that portion of the amendment above quoted relating to the granting of a hearing by the Mayor and comparing the language used therein with the language employed in Section 6 and finding that it has been adopted virtually verbatim from the latter section.

Section 6 of Article VII reads in part as follows:

"All proceedings for the revocation of licenses of manufacturers, distributors or importing distributors * * * shall be before the state commission and the proceedings shall be in accordance with the rules and regulations established by it not inconsistent with law. However, no such license shall be so revoked except after a hearing by the state commission with reasonable notice to the licensee and opportunity to appear and defend."

The rules of statutory construction as laid by our courts in determining legislative intent require that where the words appear more than once in a statute it will be presumed that the General Assembly intended to attribute to them the same meaning throughout unless there is something to show that a different meaning was intended. Applying these principles, we must conclude that the legislature intended a public hearing such as conducted by the state commission. This is a public hearing open to the public, quasi-judicial in character with all the legal safeguards for due process observed, with an official record of all proceedings preserved.

The term "public hearing" is defined in holdings of our courts as follows:

In *Bradon v. Much*, 403 Ill. 507 (1949), it was held that a "public hearing" required in passage of a zoning ordinance means the right to appear and give evidence and the right to hear and examine witnesses whose testimony is presented by the opposing parties. In *Farmers Elevators Co. v. Chicago, Rock Island and Pacific Railway Co.*, 266 Ill. 567 (1915), the court on page 573 laid down the following rule:

"The words 'public hearing' before any tribunal or body by accepted definition of lexicographers and courts, mean the right to appear and give evidence and also the right to hear and examine witnesses whose testimony is presented by opposing parties. See *Dick v. Supreme Body of International Congress*, 138 Mich. 372; 4 Words and Phrases, 3236; 2 id. (2d series) 832, and cases cited; 21 Cyc. 408, and cases cited."

In the case of *Saks & Co. v. City of Beverly Hills*, 237 F. 2d, 32, the court held that a "public hearing" contemplates a fair and impartial hearing at which competent evidence may be presented before a fair and impartial tribunal.

In conducting the prescribed public hearing, you possess all the necessary power and authority to swear witnesses, examine books and records, hear testimony, take proof and issue subpoenas. Section 4 of Article IV of the liquor act, the source of such authority provides as follows:

"Section 4. The local liquor control commissioner shall have the right to examine, or cause to be examined, under oath, any applicant for a local license or for a renewal thereof, or any licensee upon who notice of revocation has been served in the manner hereinafter provided, and to examine or cause to be examined, the books and records of any such applicant or licensee; to hear testimony and take proof for his information in the performance of his duties, and for such purpose to issue subpoenas which shall be effective in any part of this State. For the purpose of obtaining any of the information desired by the local liquor control commissioner under this section, he may authorize his agent to act on his behalf."

In connection with your duties and functions as local liquor control commissioner, you will find in the following provisions of the liquor act all the necessary authority to appoint such deputies, assistants and agents as you may find desirable or expedient.

Section 2 of Article IV provides in part as follows:

"The Mayor of each city * * * shall be * * * local liquor control commissioner * * *

"However, such Mayor, * * * may appoint a person or persons to assist him in the exercise of the powers and the performance of the duties herein provided for such local liquor control commissioner."

Section 2A of Article IV provides in part as follows:

"The City Council of each city * * * are authorized to fix and pay compensation to the local liquor control commissioner of the particular city, * * * and compensation to such deputies, assistants or employees as may be deemed necessary for the proper performance of the duties vested in him."

Section 4 of Article IV provides in part as follows:

"* * * for the purpose of obtaining any of the information desired by the local liquor control commissioner under this section, he may authorize his agent to act on his behalf."

Section 5 of Article IV provides in part as follows:

"When, in this act, the local liquor control commissioner shall be referred to, it shall include any committee or other agency appointed by such local liquor control commissioner."

In conclusion, we wish to refer you to the exposition on the matter of deputies and assistants to the local liquor control commissioner contained in an opinion to the Mayor of the City of Chicago dated April 3, 1934 and found in Opinions of the Corporation Counsel and Assistants, Volume XVIII, P. 102.

PROCEDURE FOR REVOCATION HEARING

(No. 11934—Mayor—H. A. I.—August 12, 1955.)

Supplementing our memorandum of July 25, 1955, we submit herewith a general outline of elements of procedure governing quasi-judicial hearings for your guidance as Local Liquor Control Commissioner of the City of Chicago in the conduct of public hearings to revoke or suspend a retail liquor license as prescribed by the provisions of House Bill 915. In the preparation of this memorandum, we have relied upon authoritative works in the field of administrative practice and procedure and upon leading cases reported in Illinois and other jurisdictions. We have also consulted Rules of Practice and Procedure of other liquor control agencies of other jurisdictions, as well as the procedure before the Illinois Liquor Control Commission and the License Appeal Commission.

1. General Essentials

As we pointed out in our previous memorandum, these hearings must be quasi-judicial in character with all safeguards for due process observed. The essence of fair quasi-judicial procedure as pointed out by one authority is that each party should be given an adequate opportunity to present his case and to meet the case against him. Much has been written on the subject of quasi-judicial procedure, but we feel that the excellent statement found in *Morgan v. United States of America*, 298 U. S. 468, 1935, one of the leading cases frequently cited in the field of administrative procedure, embodies many of the essential principles and should be quoted. The Court, in this case, held, where the Packers and Stockyards Act of 1921 required a hearing as

a prerequisite to the making of a rate order by the Secretary of Agriculture, that such hearing was not accorded where the Secretary, by whom the order was signed, did not personally hear or read any of the evidence presented at the hearing or hear and consider oral arguments made or read or consider the brief submitted but derived his sole information, with respect to the proceedings, from consultation with subordinates. The Court, on page 480, stated as follows:

"A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a quasi-judicial character. The requirement of a 'full hearing' has obvious reference to a tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given.

"* * * That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear.

"This necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred."

These principles laid down will have particular application when we discuss the topic of the "Decision".

2. *Hearing Officer*

The first consideration is the determination of whether the hearings will be conducted by the Local Liquor Control Commissioner in person or whether such function will be delegated to a deputy. As pointed out in our previous memorandum, the statute provides you, as Local Liquor Control Commissioner, with ample authority to appoint all the necessary deputies to assist you in the performance of your duties. Should you adopt the latter course, it will be necessary to designate one or more persons as you may see fit to act as a hearing deputy, whose duties and powers should be expressly set out in a written order.

3. *Litigation Representative*

Since the Local Liquor Control Commissioner in disciplinary proceedings has a dual role, that of judge and accuser, in order to maintain the obligation of impartiality, it will be desirable to provide a separate litigation officer, whose function it will be to present the case of the Local Liquor Control Commissioner against the licensee charged with the violation. This officer should be a representative of the staff of the Corporation Counsel of the City of Chicago, whose function will be to serve as prosecuting attorney.

4. *Notice of Hearing*

Since the statute provides for notice to the licensee (except in cases of emergency), a formal type of notice should be ultimately adopted. Such notice shall specify the time and place of the hearing and should contain a brief statement of the nature of the charges brought against the licensee. This notice should be served upon the licensee by registered mail, addressed to the licensee at the licensed premises.

5. *Hearing Room*

A permanent place of hearing should be established, which can accommodate the necessary parties, witnesses, counsel, reporters and others. It is generally desirable that the hearing be open to the public, and, unless the interests of the parties require that publicity be avoided, public attendance should not be discouraged or prohibited.

6. *Representation by Counsel*

The licensee may appear and defend himself in person or may be represented by counsel. Where an attorney appears, he should file his appearance in writing.

7. *Opening Statement*

The hearing should be opened by a brief statement by the Assistant Corporation Counsel, setting out the violations charged against the licensee. The Licensee, or his attorney, may likewise make a brief statement of defense. Where the licensee is not represented by counsel, the hearing officer should make a statement of the issues involved and the consequences of a ruling adverse to the licensee.

8. *Testimony Under Oath*

Although there is no legal requirement in Illinois to require the swearing of witnesses, it is considered good administrative practice to swear all witnesses and to have all testimony under oath. The commissioner or his deputy may, at the commencement of the proceeding, swear all witnesses collectively or administer an oath to each, individually, before he testifies.

9. *Order of Proof*

In revocation or suspension cases, the City has the burden of proof and should, therefore, present its case first. The initial witnesses should normally be the arresting police officer, followed by other witnesses upon whom the City relies to establish the alleged violation. After the direct examination by the Corporation Counsel, the licensee or his attorney may proceed to cross examine the City's witnesses. When the City has rested, the licensee should proceed to put in his defense with the right of cross examination by the Corporation Counsel. The City may call rebuttal witnesses, depending upon the nature of the evidence.

10. *Control by the Hearing Officer*

The person conducting the hearing should, at all times, exercise control over the hearing to assure proper decorum and to avoid any disorder displayed by witnesses or attorneys. Hearings should be expedited by avoiding repetitious or cumulative evidence. This can be effected by resorting to the device of the parties stipulating to admission of testimony falling in these categories, or, when such testimony is offered, the witness may make a brief avowal of the testimony which would be given, and, if the witness swears that such avowal is true, such avowal should be made a part of the record.

11. *Oral Argument*

Oral arguments should be limited or completely curtailed in the discretion of the hearing officer.

12. *Subpoenas*

The Liquor Act provides for the issuing of subpoenas by the Local Liquor Control Commissioner, and proper form for this purpose should be adopted.

13. *Continuances*

Since the licensed premises involved remain open during the pendency of the hearing, it can be anticipated that the licensee will seek to gain additional time by requests for continuances. Such requests should not be granted, unless for good cause shown. While no hard and fast rule can be laid down, requests for continuances should be generally limited to cases of illness of the licensee, preventing his attendance, or the actual engagement of his counsel in the trial of a pending case. Other reasons may be advanced but, unless special circumstances warrant requests for continuances, should not ordinarily be granted.

14. *Evidence*

While there is no statutory provision in the Liquor Act relating to the type of evidence necessary to support the findings of the Local Liquor Control Commissioner, we should follow the standard prescribed for the Illinois Liquor Control Commission by the 1955 amendment to section 6 of article VII of the Liquor Act, which provides that in all hearings before the Illinois State Liquor Commission and, by inference, the License Appeal Commission, the findings "*of the Commission should be predicated upon competent evidence*". The adoption by the Local Commissioner of any lesser standard could, in our opinion, seriously jeopardize any determination by him based on evidence, which could not meet this requirement. In the event of appeal, the License Appeal Commission on a trial de novo would, of necessity, be obliged to reject and exclude such evidence from being considered and admitted into its record, and, unless the Local Commissioner would be able to offer additional competent evidence, a reversal could be the ultimate result.

Competent evidence has been held by the courts to mean substantial common law evidence of probative character. This does not mean that all the technical rules of common law procedures must be followed, but the basic rules of evidence must be adhered to.

Hearsay evidence should not ordinarily be admitted in a quasi-judicial hearing, unless falling within the statutory or judicial exceptions to the admissibility of such evidence in civil proceedings in court.

The hearing officer should, in his discretion, impose such limitations upon the admission of evidence as are necessary to avoid records of undue length.

15. *Record of Proceedings*

The importance of a stenographic record of testimony at a hearing hardly needs any emphasis. It will be necessary when the ultimate determination is made by someone other than the hearing officer. Even where the hearing officer has the power to decide, he may need a record of the testimony for use in his preparation of the findings and decision.

Since appeals to the License Appeal Commission will be tried as trial de novo and not on the record, we can see no useful purpose in making copies of the record available to the licensee.

16. *Decision*

In the entire quasi-judicial process, the process of decision is of paramount importance. The principles were well stated in the *Morgan* case, cited above. Where the Local Liquor Control Commission conducts the hearing in person, no problems will arise, but, where the person deciding has not conducted the hearing in person, it will be necessary to devise specific procedures to enable him to consider and appraise the evidence. Future experience will dictate the most expedient methods of accomplishing this end.

17. *Written Determination*

The findings of the Local Liquor Commissioner in accordance with the statutory provisions must be incorporated in a written order of determination, setting out the basis for his conclusions and must be served upon the licensee within ten days after a hearing.

CLASS B LIQUOR LICENSE

(No. 11950—Committee on Licenses—J. C. M.—September 7, 1955.)

In your letters dated August 2 and August 22, 1955 you request an opinion as to whether the amendment to the Liquor Control Act enacted by the 69th General Assembly, providing that a license fee shall not exceed \$250.00 per year for a Class B license for the sale of canned or bottled beer in the original package and not to be consumed on the premises, is mandatory upon municipalities.

On August 29, 1955 Attorney General Latham Castle rendered an opinion to the Illinois Liquor Control Commission in which he held that the provisions of that amendment were permissive, not mandatory. I attach a copy of that opinion.

It is proper for the City Council to determine whether Chapter 147 of the Municipal Code of Chicago should be amended to reclassify licenses for the sale of intoxicating liquors. If the provisions of the amendment are permissive and not mandatory, as the Attorney General holds, and the City Council takes no action to reclassify such licenses, it would follow that the Illinois Liquor Control Commission cannot issue a Class B license under Section 4 of Article V of the Illinois Liquor Control Act to a retail dealer in the city of Chicago (1947 Ill. Atty. Gen'l. Opinions pp. 76-80). The City of Chicago having enacted local legislation providing for the issuance of a license and regulating the sale at retail of intoxicating liquor, as provided by Article 4 of the Act as amended, the requirements of the Act, under the opinion of the Attorney General, are performed.

You will note the following language on page 4 of the opinion:

"In view of the foregoing it is my opinion that while the legislature in the instant statute has provided for a Class B license, it is not mandatory on the city, village or incorporated town to enact an ordinance or resolution providing for such license so long as it does provide for a classification of licenses, such as Class A, under which the activities described under the Class B license might be conducted. The legislative intent disclosed by the amendment was merely to limit the amount of the fee to be charged for such activities when conducted under a separate, restricted form of license."

So long as the Illinois Liquor Control Commission cannot issue a Class B liquor license to retail dealers in the city of Chicago unless such retail dealer has been issued a Class B liquor license as provided by Section 13, Article III, Chapter 43 Illinois Revised Statutes (Liquor Control Act), the City Council is under no compulsion to authorize the issuance of a Class B license. We assume that the Commission will follow the views expressed in the opinion of the Attorney General.

Ed. Note: See *Silverman v. City of Chicago*, 13 Ill. App. 2d 66.

HOTEL RESTAURANT

(No. 11962—Commissioner of Buildings—H. A. I.—October 5, 1955.)

This acknowledges receipt of a letter of August 25, 1955, from the Acting Commissioner of Buildings in which he transmitted a communication received by him from attorneys representing the Park Lane Hotel, 2842 N. Sheridan Road, Chicago, Illinois, which is desirous of securing a retail liquor license in connection with an existing licensed restaurant operated on the lobby floor of the hotel. Our opinion was requested as to the propriety of this application, so that your department might be guided accordingly.

The communication points out that liquor is being served in licensed premises at other hotels in the same general area and that the public entrance to the restaurant in question is from the lobby of the hotel, and urges as a basis for the approval of this license application a recent ruling of the Circuit Court of Cook County in the case of *Churchill Corporation v. Smykal*, 54-C-13424, decided December 6, 1954.

The question thus raised by the request of your department and the transmitted communication is whether a license for the sale of liquor may be issued for a restaurant operated on the lobby floor of this hotel, which is located in an Apartment House District.

Under the Chicago Zoning Ordinance the selling of alcoholic liquor to the public as a business enterprise does not appear as an expressly permitted use in an Apartment House District. However, Section 8 of the Zoning Ordinance specifies that a hotel is a permitted use in an Apartment House District. Also specified in Section 8 as permitted uses are auxiliary uses which are defined in Section 2 of the Zoning Ordinance as:

"a use customarily incidental and accessory to the permitted use of the land area."

In setting out limitations on certain auxiliary uses, Paragraph 7 of Section 8 expressly includes a restaurant in an Apartment House District as being a proper auxiliary use in a hotel by language reading as follows:

"A restaurant may be located in a hotel if the public entrance of the restaurant is from the lobby of the hotel and no sign advertising the restaurant is visible to persons outside the hotel."

In an opinion dated April 5, 1945, we held that the provisions in the Zoning Ordinance permitting a restaurant in a hotel in an Apartment House District as an auxiliary use is valid even though no such use would be permitted in an apartment building (Volume 22, Opinions of the Corporation Counsel, Page 442, No. 10830).

Since it is clearly established that a restaurant may be a proper legal use of property located in an Apartment House District, we turn now to the *Churchill* case referred to in the communication to ascertain what ruling was laid down by the court in this matter. The *Churchill* case involved an action in mandamus, brought by the Churchill Hotel, to compel the Commissioner of Buildings to approve, as to zoning, an application for a license authorizing the retail sale of alcoholic liquors in connection with a restaurant on the

lobby floor of the Churchill Hotel. The refusal by the Commissioner of Buildings to approve this application had been based on the grounds that the proposed use was in violation of the Chicago Zoning Ordinance, since the hotel was located in an Apartment House District in which the sale of alcoholic liquor at retail does not appear as an expressly permitted use under the Chicago Zoning Ordinance. The court ruled that the hotel "was entitled to operate a bar for the dispensing of alcoholic beverages in connection with the operation of the restaurant on the main floor of this hotel building provided that the public entrance to the restaurant is from the lobby of the hotel and no sign advertising the restaurant is visible from the outside of said hotel."

The court had referred the matter to its Master in Chancery to hear evidence and report his findings. We have reviewed the transcript of testimony and the Master's report and find that the evidence heard by the Master described the Churchill Hotel, located at 1255 N. State Street, as a 210 room, 9 story building, which for many years had a restaurant operation in the main lobby of the hotel. This restaurant had been discontinued in recent years and it was now proposed to resume this operation. The record shows that the public means of ingress and egress to the restaurant was from the lobby.

Evidence was introduced in the *Churchill* case to the effect that there were in the area immediately adjacent to the Churchill Hotel, other hotel operations both across the street and within 1½ blocks away, hotels in which liquor was being sold in connection with the conduct of restaurants or in cocktail lounges.

The Master in his report later approved by the court states in part as follows:

"* * * The Master does not conclude that at all times and in all places in the City of Chicago a restaurant operation must in necessity have an attendant right to dispense liquor, but the Master does conclude that in the instance of the Churchill and its proposed restaurant operation the dispensing of liquor in connection with the operation is a must. The history and nature of restaurant operations in the entire surrounding area is conclusive proof of this."

In the case of the Park Lane Hotel, which you now present to us, the communication describes a 12 story building with 462 rooms having an occupancy similar to that of the Churchill. The Park Lane likewise has, and continues to have, a licensed restaurant on the lobby floor with no public entrance on the street.

From the facts, as stated in the transmitted communication, it appears that alcoholic liquor is presently being sold at the Bel Air Hotel, 424 W. Diversey Parkway, and the Commonwealth Hotel, 2737 N. Pine Grove, the former, around the corner from the Park Lane and the latter, around the corner and across the street. The facts also show that in the identical zoning situation and fronting along the same street facing Lincoln Park in the same general area are the Belmont Hotel, 3172 N. Sheridan Road, the Belden-Stratford Hotel, 2300 N. Lincoln Park West, the Webster Hotel, 2150 N. Lincoln Park West, and the Parkway Hotel, 2100 N. Lincoln Park West, in all of which liquor is being sold in restaurants and cocktail lounges.

In view of these comparable facts and the finding in the *Churchill* case from which this office recommended that no appeal be taken, we are of the opinion that there is no sufficient distinction of fact to suggest a court would reach a conclusion contrary to that reached in the *Churchill* case. It is, therefore, our opinion that you should approve the application for a liquor license for the restaurant located on the lobby floor of the Park Lane Hotel as to zoning. This opinion should not be read so as to conclude that the sale of liquor is a proper auxiliary use under the Zoning Ordinance in the case of all hotels located in Apartment House Districts. Each situation should be examined as it arises in light of all the pertinent surrounding facts.

LIQUOR IN A RETAIL DEPARTMENT STORE

(No. 11976—Commissioner of Police—H. A. I.—October 27, 1955.)

This acknowledges receipt of your recent letter transmitting a communication from the General Attorney of Carson, Pirie, Scott and Company, which reads, in part, as follows:

"Recently our General Superintendent inquired of your office as to whether or not a Retail Dealer's Liquor license could be issued to us and in the conversation attention was called to Chapter 147, Par. 8, of the Municipal Code of Chicago. Your office was not at the moment able to locate an opinion from the Corporation Counsel's office concerning liquor licenses to retail stores, although the officer in charge intimated that such an opinion had been given at a prior date. The purpose of this letter is to obtain an official ruling as to whether or not the cited ordinance prohibits the issuance of such a license to us. Please let us hear from you at your early convenience directing your reply to the writer."

You conclude with a request that we furnish an opinion on the subject.

Section 147, Paragraph 8 of the Municipal Code of Chicago, frequently referred to as the "side line" ordinance, passed by the City Council on April 23, 1941, with its effective date fixed as of October 31, 1941, reads as follows:

"Whereas, the sale of alcoholic liquor in the city of Chicago is an industry which in the interest of public policy and morals should be removed from the observation of and influence on minors insofar as the same is possible;

And whereas, it is advisable to remove the sale thereof from premises where women, to whom the sale of such products may be objectionable, frequently do their purchasing of family necessities and supplies;

And whereas, enforcement of the restriction against the sale of alcoholic liquor to minors becomes most difficult and in many instances impracticable where such sale is conducted in and about the premises of retail establishments necessarily or often frequented by minors;

Now therefore, in the interest of public policy and morals, from and after October 31, 1941 no city retailer's license for the sale of alcoholic liquor shall be issued for any premises wherein any commodities other than alcoholic liquors are to be sold (food and beverages for consumption on said premises and cigars and cigarettes excepted). This section shall not apply to the lobbies of hotels and clubs."

This ordinance was similar to other so called "side line" ordinances, which had theretofore been adopted by other municipalities in the State of Illinois. Such an ordinance had been upheld in 1937 by the Supreme Court of Illinois in the case of *The Great Atlantic and Pacific Tea Company v. The Mayor and Commissioners of the City of Danville* (1937), 367 Ill. 310, as a reasonable exercise of the powers granted to municipalities by Section 1 of Article IV of the Illinois Liquor Control Act.

The ordinance involved in the *Danville* case provided, in part, as follows:

"In the interest of public policy and morals no retail liquor license shall be granted to any firm, corporation, or person whose principal business is the sale at retail of grocery and/or meat products."

Section 1 of Article IV of the Illinois Liquor Control Act, prior to an amendment of 1941, gave cities and villages power by general ordinance, to determine the number, kind and classification of licenses for the sale of alcoholic liquor and *"to establish such further regulations and restrictions upon the issuance of and operation under local licenses not inconsistent with law as the public good and convenience may require"*. (Emphasis added.)

In the 1941 Session of the Illinois General Assembly, Section 1 of Article IV, referred to above, was amended. The amended section, effective July 11, 1941, after general provisions similar to the original section and further provisions that women or minors, other than the licensee or the wife of a licensee should not pour, mix or draw alcoholic liquors as an employee of the retail licensee and prohibiting minors from attending bar, empowered cities and villages *"to establish such further regulations and restrictions upon the issuance of and operation under local licenses not inconsistent with law as the public good and convenience may require; provided, however, that in the exercise of any of the powers granted in this section the issuance of such licenses shall not be prohibited except for reasons specifically enumerated in sections 2, 8, 8a and 21 of Article VI of this Act."* (Emphasis added.)

Section 2 of Article VI of the Act defines persons ineligible to receive liquor licenses.

Section 8 of Article VI prohibits the issuance of licenses for the sale of alcoholic liquor within 100 feet of any church, school, etc.

Section 8a of Article VI provides that no license shall be issued to any person for the sale at retail of any alcoholic liquor at any store or other place of business where the majority of customers are minors of school age or where the principal business transacted consists of school books, school supplies, food lunches or drinks for such minors.

Section 21 of Article VI deals with the issuance of liquor licenses to restaurants.

Subsequent to the passage of the amendment of 1941, the Appellate Court in the case of *Walgreen v. Garland* (1942), 316 Ill. App. 635, had occasion to pass upon the validity of an ordinance of the City of Des Plaines, Illinois, virtually identical with the Danville ordinance providing as follows:

"In the interest of public welfare and good morals and in order to prevent and lessen the possibility of minors purchasing alcoholic liquor, no Class B license shall be issued to any person, firm or corporation who deals in, or sells any other food stuffs, goods, wares or merchandise (soft drinks for consumption off the premises where sold excepted)."

The court, in reviewing the ruling in the *Danville* case, conceded that the Danville ordinance was not repugnant to or inconsistent with the provisions of Section 1 of Article IV as it then read. The court, however, held that the amendment of 1941 specifically providing that municipalities shall not prohibit the issuance of licenses on grounds not included within the proviso of such amended Act, had narrowed the area within which municipalities could legislate; that the ordinance of the City of Des Plaines, prohibiting the issuance of liquor licenses to persons dealing in food stuffs, goods and merchandise, was in conflict with the Illinois Liquor Control Act being outside the scope of and not falling within the specifically enumerated reasons set out in sections 2, 8, 8a and 21 of Article VI and, therefore, the ordinance was invalid.

It will be readily noted that Chapter 147-8 of the Municipal Code of Chicago was intended to prohibit the issuance, with certain exceptions, of retail liquor licenses to premises wherein any commodities other than alcoholic liquor are to be sold. The ground for such a prohibition is not one of those expressly enumerated in sections 2, 8, 8a or 21 of Article VI referred to above.

Applying the reasoning set out in the *Walgreen* case, we must similarly conclude that Chapter 147-8 of the Municipal Code of Chicago is invalid as being in conflict with Section 1 of Article IV of the Illinois Liquor Control Act.

In support of our conclusion we wish to cite an opinion of the Attorney General of the State of Illinois to the Illinois Liquor Control Commission dated October 14, 1941 (Attorney General's Opinions for the year 1941, No. 93), issued prior to the decision in the *Walgreen* case, ruling that Chapter 147-8 of the Municipal Code of Chicago, the ordinance in question, was invalid as being in excess of the powers granted as limited by the proviso in Section 1 of Article IV of the Illinois Liquor Control Act as amended in 1941.

It is, therefore, our opinion that Chapter 147-8 of the Municipal Code of Chicago has no force and effect and is unenforceable. It is our further opinion that this provision of the Municipal Code should not be a bar to the issuance of a Retail Dealer Alcoholic Liquor license to Carson, Pirie, Scott and Company, if this company is otherwise qualified to receive such a license.

ADDITIONAL BAR—ONE LOCATION

(No. 11996—Deputy Liquor Control Commissioner—H. A. I.—December 30, 1955.)

This acknowledges receipt of your letter of December 19, 1955, transmitting a communication directed to the Mayor of the City of Chicago as Local Liquor Control Commissioner, from attorneys representing one Eugene Gibbs, licensee of a retail liquor establishment located at 6213 No. Broadway in Chicago. The communication points out that Gibbs had operated a liquor establishment continuously at this address from May, 1947; that, in May, 1953, because of expanding business, he leased additional space to the rear and to the immediate south of his original premises and set up an additional bar and other facilities in this added space. You request an opinion whether one City Retail Liquor License is sufficient for the two bars. Chapter 147-2 of the Municipal Code of Chicago, the Retail Liquor Dealers' License Ordinance, provides, in part, as follows:

"147-2. No person shall sell at retail any alcoholic liquor without first having obtained a city retailer's license for each location, place, or premise where the retailer is located to sell the same.

Where two or more such locations, places, or premises are under the same roof or at one street address, a separate city retailer's license shall be obtained for each such location, place, or premise; provided that nothing herein contained shall be so construed as to prevent any hotel operator licensed under the provisions of this chapter from serving alcoholic liquor to his registered guests in any room or part of his hotel, if such liquor so served shall be kept in and served from a licensed location, place or premise in said hotel. * * *"

The question presented for our consideration is whether or not the premises in question constitute two separate locations as to require two separate licenses. Earlier, we were presented with similar problems when requested by the Superintendent of the Bureau of License Enforcement to interpret the provisions of Section 3143B of the Retail Beverage Ordinance then in force, the forerunner of our present Liquor Ordinances and, virtually, identical in language with the provisions of Chapter 147-2, above quoted, which provided as follows:

"Section 3143-B of the Retail Beverage ordinance as amended June 28, 1933 and July 7, 1933, provides as follows:

'License Required.) No person, firm or corporation shall engage in the business of a retail beverage dealer without first having obtained a license for each stand, place, room or enclosure where such beverages are purveyed or dispensed at retail. Where two or more stands, places, rooms or enclosures are located under the same roof or at one street address separate licenses shall be required for each such stand, place, room or enclosure. * * *'

In an opinion, No. 8199, dated November 2, 1933 (Opinions of the Corp. Coun., Vol. XVIII, p. 507), this office laid down the general rules to be followed in determining whether one or more licenses would be required in any given situation. This opinion proceeded to analyze the leading Illinois case, *Malkan v. City of Chicago*, 217 Ill. 471. In this matter, the Supreme Court had under consideration the City's Dram Shop Ordinance. Malkan had been granted a license to keep a saloon at 178 Quincy street. He maintained two establishments, one on the main floor of the building at that number and one in the basement, each having separate equipment and catering to different clientele. They were not directly connected. The question arose whether the city had lawfully compelled him to pay a second license fee for the saloon in the basement. The court held that the basement was a separate place and that Malkan had properly been required to pay two license fees. On p. 481 of its opinion the court said:

"In 17 American and English Encyclopedia of Law (2d ed. p. 237), it is said: 'One license will not authorize the person or persons licensed to conduct the business in more than one place. A license is necessary for each place, in which the business is conducted.' (*State v. Walker*, 16 Me. 241; *Commonwealth v. Estabrook*, 10 Pick. 293.) In *Thomas v. Aria*, 122 Iowa 538, the Supreme Court of Iowa said: "The only question presented for our determination is whether a person, having paid but one tax and having but one license, may keep for sale and sell intoxicating liquors, in two different and wholly separate rooms in the same building. We are clearly of the opinion that such question must be answered in the negative. To hold otherwise would certainly violate not only the spirit of the law, but, we think, the letter of the law. Section 2432 of the code provides that "every person, * * * maintaining a place where intoxicating liquors are sold or kept with intent to sell, shall pay an annual tax," etc. It must be manifest from our statement of the facts, that the defendant is maintaining two places, each independent of the other in every material sense necessary to be considered. The mere fact, that by his license he is authorized to carry on business in the building mentioned cannot be construed to confer the right on defendant to cut such building up into separate rooms, the number to be limited only by the capacity of the building, or the extent of the premises, and in each maintain an independent place for the sale of liquors." The Iowa case last mentioned seems to be on all-fours with the case at bar, and the doctrine of it commends itself to our approval.

"* * * In a large city like Chicago, where there are immense buildings in the business district, it cannot be assumed that a man, who takes out a license to keep a saloon at a certain number, intends to open any number of saloons in the building, where such number is found."

We then stated that:

"In our opinion a rule of reason should be followed so as not to make the construction of the ordinance absurd or render it repugnant to the State Malt and Vinous Beverage Act. For example, if a grocery store or delicatessen shop is comprised of two contiguous stores physically thrown together and operated by one proprietor as one place we

should regard the establishment as but one place, location or premise requiring only one license. Likewise, if a beverage dispensing tavern or parlor consisted of a store partitioned off into two rooms yet operated by one proprietor as a single unit we would regard the requirements of the law satisfied if but one license were issued. Where, however, two or more places or rooms, even though located under the same roof or at one street address and owned and operated by the same person are so separate and distinct in location, character and clientele as fairly to be considered separate premises, each of such establishments would, in our opinion, require a separate license. It is of no material consequence that one beer dispensing outfit serves a number of separate stands, places, rooms or enclosures. The ordinance makes no distinction between stands, places, rooms or enclosures where bars are located and those where there are no facilities for storing, icing and drawing beer and wine."

In a subsequent opinion, dated November 3, 1933, No. 8202, addressed to the Superintendent of the Bureau of License Enforcement (Opinions of the Corp. Counsel, Vol. XVIII, p. 508), we were asked to rule on a situation similar to that presented herein. We were there confronted with a case where a particular person rents two stores with beer dispensing facilities set up in one of them, and beer being served to patrons in both stores, which have separate entrances and separate addresses and which are connected by an interior opening, affording a passage from one to the other. In ruling on that matter, we laid down the following principles, from which we quote:

"If the stores are contiguous and fairly may be regarded as one place or premise then in our opinion one license would suffice. However, if the two stores are not immediately adjoining and connecting so as to be regarded as one place or premise in fact, then we believe two licenses would be required.

"In the situation last above stated you then ask if the two stores could be closed by a door, would the situation be altered. In our opinion this fact would not be controlling but the important question of fact to be determined would be whether or not the two stores were so closely connected as to be considered in fact one establishment.

"You then ask whether, in the case of one store with a partition separating the rear part of the store from the front, with an opening providing access between front and rear, if a license would be required for the front room and another license for the rear room, both rooms being controlled and operated by one proprietor with one beer dispensing unit, patrons coming in the front door and passing into the rear room. In such a situation our belief is that the rule of reason would require the establishment to be considered as one place requiring but one license. It is also our belief that the situation would not be altered if the opening between the two rooms could be closed by a door. We would hold to this opinion even in the case of a corner store with a rear room having a separate entrance by means of a door opening on the side street."

From the information set forth in the transmitted communication and from a study of the accompanying plat, it appears that the original premises, 6213 No. Broadway, occupied a center store, approximately 15 feet wide by 60 feet in a structure consisting of three stores, each having a 15 foot frontage on No. Broadway. To the south of the tavern, the structure extended for a distance of 120 feet in depth. The latter premises were originally occupied by a laundry, which abandoned the rear 60 feet thereof in 1953. This section of the structure was leased by the licensee, Eugene Gibbs, and the additional space was connected to that of the original tavern premises. As a result of the remodeling, the original entrance at 6213 No. Broadway serves as the entrance to the combined premises.

A parking lot in the rear of the premises, providing parking facilities for the patrons, may be reached by an exit in the rear of 6213 No. Broadway.

The only exit from the additional space is a fire exit in the south wall, which, apparently, is not used for any other purpose. An additional bar and booths have been installed in the added section. An opening without a door permits persons to pass from one section to another. One set of toilet facilities serves both sections. The transmitted communication points out: "That there is only one operation involved in this establishment, both bars are situated on the same floor level, and there is free ingress and egress between the rooms in which the respective bars are located. The operation is uniform throughout the establishment, and employees, as well as customers, are able to circulate freely and have free access to all parts of the premises."

Applying the test set forth in our former holdings, it is our opinion that, on the basis of the facts and data furnished by the applicant, a rule of reason would require us to hold that the establishment in question must be considered as one place, requiring but one license.

LIMITING NUMBER—ASSIGNMENT OF RENEWAL RIGHTS

(No. 12010—Committee on Licenses—H. A. I.—February 3, 1956.)

This acknowledges receipt of your communication of January 6, 1956, wherein you request our opinion as to the validity of a proposed ordinance amending Section 147-5 of the Municipal Code of Chicago by adding thereto the following:

"147-5a. Provided that not more than 7500 licenses shall be issued and further provided that all licensees who have local retail liquor licenses now issued to them shall be entitled to have such licenses renewed and reissued subject to the terms and provisions of the laws and ordinances in force, but no retail liquor license other than a renewal or reissuance hereinafter provided shall at any time hereafter be granted or reissued until the total number of retail liquor licenses in force shall be less than 7500, whereupon such new licenses shall be issued from time to time to qualified applicants according to the priority of application upon full compliance by the applicant with the laws and ordinances as now in force or as hereafter amended until the total number of retail liquor licenses in force in the City of Chicago shall be 7500.

"Assignment of Right to Renewal. The owner or owners or his or their legal representative of a retail liquor license shall have and be hereby given the right to the renewal or reissuance of such license in the same or different place of business upon compliance with the ordinances now in force in the City of Chicago or which may hereafter be passed governing the issuance of retail liquor licenses and such owner or owners or his or their legal representative of a retail liquor license may assign or convey the right to the renewal or reissuance thereof to a person, firm or corporation in accordance with the provisions of the ordinances of the City of Chicago, who upon full compliance of the ordinance then in force in the City of Chicago, governing the issuance of retail liquor licenses shall be entitled to renewal or reissuance of such license in his, its or their own name and which holder of a license or his legal representative in turn may assign or convey such right to the renewal or reissuance provided by this ordinance shall apply only so long as the license in each case shall have been kept in force continually and uninterruptedly in the name of the licensee or his successor in interest.

"Assignment in Writing. The owner or owners or his or their legal representative of a retail liquor license issued by the City of

Chicago, may, in the manner hereinafter provided and subject to the provisions and conditions hereinafter expressed, convey and assign the right to the renewal or reissue of such license. All such assignments shall be in writing, signed by the person, firm or corporation owning such retail liquor license and shall be filed with the City Clerk of the City of Chicago, who shall keep a true and complete record of all assignments upon the filing of any such assignment. The City Clerk shall endorse thereon the time of such filing and upon compliance by the assignee with all the laws and ordinances then in force in the City of Chicago pertaining to the qualifications of an applicant for a retail liquor license and the surrender of the old retail liquor license to the City Clerk for cancellation there shall unless the old retail liquor license shall have been revoked and not thereafter restored, be issued to the assignee named in such assignment a license for the same or different place from that specified in the old license in lieu of the one so surrendered for the unexpired portion of the period covered by the license so surrendered upon condition, however, that such new license shall be issued only upon the payment of the fee of \$25.00. Any assignee of the right to the renewal or reissue of a license may, before a new license has been issued, pursuant to such assignment, release any such assignment which shall have been made hereunder and such release shall be filed with the City Clerk of the City of Chicago who shall duly note such release on the records of the assignments so kept by him."

An examination of the submitted amendment discloses that it embraces two distinct proposals: 1. A limitation upon the total number of licenses to be issued within the City of Chicago, and 2. Assignment of the right of renewal of a retail liquor license.

The first question presented for our consideration is whether the City of Chicago has the power by ordinance to impose a limitation on the total number of licenses to be issued. Since the only powers municipalities have to control the retail liquor business are conferred by the Illinois Liquor Control Act (*City of Fairfield v. Pappas* (1935), 362 Ill. 80), we must look to this Act to determine if power or authority to impose such limitation is conferred upon the City.

Section 1 of Article IV of the Illinois Liquor Control Act provides as follows:

"Section 1. *In every city, village or incorporated town, the city council or president and board of trustees, and in counties in respect of territory outside the limits of any such city, village or incorporated town the county board shall have the power by general ordinance or resolution to determine the number, kind and classification of licenses, for sale at retail of alcoholic liquor not inconsistent with this Act and the amount of the local license fees to be paid for the various kinds of licenses to be issued in their political subdivision, except Class B retailer's license shall not exceed \$250 per year and except those issued to the specific non-beverage users exempt from payment of license fees under section 4 of Article V thereof which shall be issued without payment of any local license fees, and the manner of distribution of such fees after their collection; to prohibit any woman or minor, other than a licensee or the wife of a licensee, from drawing, pouring or mixing any alcoholic liquor as an employee of any retail licensee; and to prohibit any minor from at any time attending any bar and from drawing, pouring or mixing any alcoholic liquor in any licensed retail premises; and to establish any further regulations and restrictions upon the issuance of and operation under local licenses not inconsistent with law as the public good and convenience may require; and to provide penalties for the violation of regulations and restrictions, including those made by county boards, relative to operation under local licenses; (provided, however that in the exercise of any of the powers granted in this section, the issuance of such licenses shall not be prohibited*

except for reason specifically enumerated in Sections 2, 8, 8a and 21 of Article VI of this Act.") (Emphasis supplied. Portion in parentheses added by amendment of 1941.)

Section 1 of Article VI provides in part as follows:

"Any licensee may renew his license at the expiration thereof, provided he is then qualified to receive a license and the premises for which such renewal license is sought are suitable for such purpose; *and provided further that the renewal privilege herein provided for shall not be construed as a vested right which shall in any case prevent the city council or village president and board of trustees or county board, as the case may be, from decreasing the number of licenses to be issued within its jurisdiction.*" (Emphasis supplied.)

While there have been decisions of the Illinois courts under prior dram-shop acts with respect to the right of municipalities to limit liquor licenses, there have been no rulings of our courts directly in point construing Section 1 of Article IV of the Act, as amended in 1941. However, the Attorney General of Illinois, in an official opinion, dated February 7, 1942, Opinion No. 108, in response to a request as to whether city councils or county boards have the power to limit the number of retail liquor licenses in their respective political subdivisions under Section 1 of Article IV, ruled that the limitation upon the issuance of city licenses contained in the proviso of Section 1 of Article IV, limits the power of city councils and county boards only under the general powers expressed in said Section 1 of Article IV with reference to restrictions and regulations upon the issuance of retail liquor licenses; and that to place a construction that the number of retail liquor licenses cannot be limited would be to render a portion of that section meaningless and void.

In a subsequent opinion, the Attorney General on July 2, 1947, Opinion No. 539, in response to a request whether local ordinances limiting the number of retail liquor licenses were valid reaffirmed his previous ruling.

In an opinion of the Corporation Counsel dated March 28, 1946, addressed to the Chairman of the Committee on Licenses (Opinions of Corporation Counsel, Vol. 22, P. 238) this office discussing the general proposition of limiting liquor licenses stated as follows:

"Inasmuch, * * * as the legislature has conferred upon the city council express power to determine the number of retail licenses to be issued in the city our opinion is that the only effect of the restrictions contained in the above mentioned proviso is to restrict prohibitions against the issuance of the number of licenses established by the city council in its limiting ordinance to 2, 8, 8a and 21 of article VI. In other words our thought is that the city council may limit the total number of licenses but when the city issues that number it may not refuse issuance except for reasons specifically enumerated in sections 2, 8, 8a and 21 of article VI."

The case of *People v. Harrison* (1912), 256 Ill. 102, which we will have occasion to refer to below, supports these conclusions. There the Court had under consideration an ordinance of the City of Chicago adopted pursuant to authority conferred upon it by the Legislature, Section 2 of which provided for a limitation upon the total number of saloon or dram-shops within the City's boundaries, and Section 3 related to the right of renewal or reissue and the assignment of such right. In holding that the ordinance was valid in so far as it limited the number of liquor licenses that may be issued within the corporate area, the court stated as follows (p. 107):

"The city council having determined that the interests of the municipality will be subserved by limiting the number of saloons within its boundaries, its discretion cannot be controlled by the court, even if the latter should not agree with the conclusion. No one's constitutional right is impaired, and if the limitation prevents some per-

sons from keeping dram-shops who might do so under an unlimited ordinance, that result is merely an incidental effect, which does not affect the validity of the limitation imposed with a view to the public welfare in the reasonable exercise of the police power of the State. Everybody has an equal right to apply for a license, and when the number authorized by the ordinance has been granted everybody is equally excluded from the business. * * *

From the foregoing quoted sections of the Illinois Liquor Control Act and the cited Authorities, it is our opinion that such portion of the proposed amendment dealing with the limitation to be imposed upon the number of liquor licenses to be issued within the City of Chicago would be valid as being a proper exercise of the powers conferred upon the City in Section 1 of Article IV and Section 1 of Article VI.

We now come to the second question presented, may the City by ordinance provide for the assignment of the right to renewal of a retail liquor license.

Section 1 of Article VI of the Illinois Liquor Control Act provides in part as follows:

*"Section 1. A license shall be purely a personal privilege, good for not to exceed one year after issuance, except a non-beverage user's license, unless sooner revoked as in this Act provided, and shall not constitute property, nor shall it be subject to attachment, garnishment or execution, nor shall it be alienable or transferable, voluntarily or involuntarily, or subject to being encumbered or hypothecated. Such license shall not descend by the laws of testate or intestate devolution, but it shall cease upon the death of the licensee, provided that executors or administrators of the estate of any deceased licensee, and the trustee of any insolvent or bankrupt licensee, when such estate consists in part of alcoholic liquor, may continue the business of the sale or manufacture of alcoholic liquor under order of the appropriate court, and may exercise the privileges of the deceased or insolvent or bankrupt licensee after the death of such decedent, or such insolvency or bankruptcy until the expiration of such license but not longer than six months after the death, bankruptcy or insolvency of such licensee. * * ** (Emphasis supplied.)

In an opinion of the Corporation Counsel dated March 26, 1934, addressed to the City Collector of the City of Chicago (Opinions of Corporation Counsel, Vol. 18, P. 484, Opinion No. 8342) in response to a request for our opinion upon the question of whether a transfer of a city retailer's alcoholic liquor license from an original licensee to another person is authorized, we held, after quoting Section 1 of Article VI of the Liquor Act, that:

"In our opinion the prohibition against the transfer or alienation of a license contained in the above quoted paragraph applies not only to liquor licenses issued by the Department of Finance of the State of Illinois, but also to all retail liquor dealer's licenses issued by the local commissions and commissioners. Hence, the transfer or attempted transfer of a city retailer's license from one person to another would be in contravention of the State Act and therefore invalid."

In *Litzelman v. Town of Fox* (1936), 285 Ill. App. 7, the question of the nature of the right of an individual under a liquor license and the right created by the issuance of such a license, under Section 1 of Article IV of the Illinois Liquor Control Act, was before the Appellate Court, which stated as follows (p. 12):

"Before they could lawfully conduct such business in their taverns, it was necessary for them to comply with the provisions of the Dram Shop Act and acquire a license. The right to such a license is not a civil right. Section 1, Article VI of the Dram Shop Act provides that

a license issued under its provision is purely a personal privilege, cannot be assigned, is not a subject of inheritance and shall not constitute property." (Emphasis supplied.)

A number of earlier decisions construing the Dram Shop Act of 1874 are in point. Section 4 of the Act of 1874 contained many provisions that were similar in many respects to the present Illinois Liquor Control Act and provided in part as follows:

"The license shall state the time for which it is granted, *which shall not exceed one year*, the place where the dram-shop is to be kept, and *shall not be transferable.* * * *." (Emphasis supplied.)

In the case of *Curry v. City of Aurora* (1913), 175 Ill. App. 57, the court had under consideration an ordinance which required the city authorities to renew each liquor license at the end of the year and issue another license, and made the right of such renewal transferable by the licensee and transferable again by his assignee. The court held that these provisions were invalid, as a license to keep a dram-shop is as much a personal matter, depending upon the fitness and character of the licensee, as is a license to practice law or medicine; that the statute only allowed a license for one year; and, that the Act of 1874 expressly made the license not transferable.

In *Hoyt v. McLaughlin* (1911), 250 Ill. 442, the court held that under the provisions of Section 4 of the Dram Shop Act of 1874 it was not lawful for one person to conduct a dram-shop under a license issued to and in the name of another and that a liquor license was not transferable.

In municipal liquor control legislation, provisions such as the submitted proposal for the absolute right to a renewal or reissuance of a liquor license and the assignment of such right are neither original nor novel. Similar measures were contained in the liquor codes of an earlier era of numerous Illinois municipalities. In fact, provisions identical with the submitted proposal appear in an ordinance enacted by the City Council of the City of Chicago in 1906 and are at page 539 of the Chicago Code of 1911, as paragraph 529 of Article I of Chapter XLII entitled "Liquor". It was this 1906 ordinance which was involved in *People v. Harrison* (1912), 256 Ill. 102. It is set out in full at page 104 of the Court's opinion. While upholding the limitation provision discussed above, the Court ruled that the section relating to the absolute right to renewal or reissuance and the assignment of the right of renewal was invalid because it contravened the statute then in force, prohibiting the issuance of a liquor license to extend beyond the municipal year in which it may be granted. The court stated on page 109:

"* * * The effect of the ordinance is that the license, once issued, entitles the holder or his assignee to a perpetual continuance of the privileges granted, subject to the ordinances of the city. The city has no discretion about the continuance of the license. If the licensee or the assignee complies with the ordinance he has an absolute right to the continuance of the license by virtue of the fact, only, that he holds a license. The intention of the statute is that the right of the licensee shall cease with the municipal year and the city council shall have no right to grant him any powers beyond that period. Calling the subsequent term a renewal or re-issue does not change the fact that the ordinance attempts to extend the rights conferred by the license beyond the municipal year."

To the same effect, holding that there can be no assignment of the rights of renewal are *Bartkowiak v. Malinowski* (1912), 256 Ill. 119, and the *United Breweries Co. v. Price* (1915), 197 Ill. App. 289.

In view of these holdings, it is our opinion that such portion of the proposed amendment, relating to assignment of the right of renewal of a retail liquor license, is invalid because it contravenes Section 1 of Article VI of the Illinois Liquor Control Act.

PRIVATE CLUB

(No. 12069—Commissioner of Police—E. W. P.—August 24, 1956.)

We have your letter of July 6, 1956, transmitting an application of Telocvicna Jednota Sokol Fuegner of South Chicago for a license to sell alcoholic liquor to its members only on the first floor of the premises, located at 10756 Green Bay Avenue, Chicago, Illinois, known as the Sokol Hall. You request our opinion as to whether or not such a license could be properly issued to the applicant for these premises.

The City Council passed an ordinance on August 4, 1950, appearing in the Journal of Proceedings of the City Council of that date at page 6751, amending Section 147-4 of the Municipal Code of Chicago by adding thereto the following:

"Provided, that in the case of a lodge or local chapter or corresponding unit of any fraternal order or other association of a kindred nature which is national or state-wide in organization or character, or any body, the membership of which is comprised of persons who have served in the military or naval services of the United States, and which are organized under the 'General Not for Profit Corporation Act' of the State of Illinois and which has been in active and continuous existence for at least three years prior to the date on which application for license is filed and which in good faith maintains a membership roll during said three-year period and has, at the time application is filed, more than fifty members with dues paid to date, and which is the owner, licensee, or occupant of an establishment operated solely for objects of a national or state-wide social, patriotic, recreational, benevolent purpose or the like, but not for pecuniary gain or profit, and the property as well as the advantages of which belong to all the members thereof, the fee for a city retail liquor dealer's license for the sale to members only shall be fifty dollars for the whole or any portion of the license period for which application is made."

For the purpose of showing that it comes within the purview of the above ordinance, the applicant has submitted in support of its application an affidavit, dated July 24, 1956, signed by George Dvorscak, as Secretary of the Telocvicna Jednota Sokol Fuegner, being first duly sworn on oath deposes and says:

"that he is the duly elected Secretary of the Telocvicna Jednota Sokol Fuegner of South Chicago, an Illinois corporation organized not for profit and duly incorporated on February 5, 1904; that its principal headquarters and club rooms are located on the first floor of 10756 Green Bay Avenue in the City of Chicago.

That it is a local chapter of the American Order of Sokols, a national fraternal organization, organized for the purpose of promoting national and international sportsmanship and goodwill amongst its members; that the American Order of Sokols maintains branches in numerous cities throughout the United States.

That the Telocvicna Jednota Sokol Fuegner of South Chicago, since its incorporation and for more than three years last past, has at all times maintained a membership of more than fifty (50) fully paid up members and that the present membership of the said Telocvicna Jednota Sokol Fuegner of South Chicago, as of this date, consists of sixty (60) fully paid up members.

That since February, 1904, it has been in continuous existence and has been engaged in furthering gymnastics and sports and other benevolent activities.

That the said Telocvicna Jednota Sokol Fuegner of South Chicago has been organized and has been since its incorporation been devoted to benevolent and charitable purposes only and during its existence arranged, in affiliation with the American Order of Sokols, various athletic and gymnastic meetings on a city wide basis, proceeds of which are distributed to churches and other charitable organizations.

The Telocvicna Jednota Sokol Fuegner of South Chicago operates its club headquarters at the aforesaid address where it maintains a suitable and adequate kitchen, dining room, and equipment and maintains a sufficient number of employees for cooking, preparing and serving meals for members and their guests."

The above facts set forth in the affidavit disclose that the applicant is a local chapter of a national association, organized under the "General Not for Profit Corporation Act" of the State of Illinois for a period of three years prior to the date of filing the application, has more than 50 members with dues paid to date, is operating solely for benevolent purposes and is a "club" as defined by the Illinois Liquor Control Law, Section 2.24 of Article I.

It is, therefore, our opinion that based upon the information contained in the application and affidavit, the Telocvicna Jednota Sokol Fuegner of South Chicago is qualified under Section 147-4 of the Code, as amended, for a license to sell alcoholic liquor to its members only on the premises located on the first floor of 10756 Green Bay Avenue, Chicago, Illinois.

WITHIN ONE HUNDRED FEET OF A CHURCH

(No. 12071—*Deputy Liquor Control Commissioner—E. W. P.—August 29, 1956.*)

This acknowledges your memoranda of July 25, 1956 and August 27, 1956, relative to the petition addressed to the Honorable Richard J. Daley, Mayor of the City of Chicago, from Fitzshall and Fitzshall, representing Ball-N-Pin, Inc., a Corporation, of 1501-03 Berwyn Avenue, Chicago, Illinois. The Corporation on April 24, 1956 filed its application with the City Collector for a license for the sale of liquor, which set forth that said sale would be confined to the front 40 feet on the second floor of the leased premises of the corporation in which it now conducts a bowling alley located at 1501-03 Berwyn Avenue, Chicago, Illinois.

This application was disapproved on or about May 28, 1956 by the Liquor Control Commissioner for the reason that the location of the premises is less than 100 feet from the First Evangelical Free Church of 5255 N. Ashland Avenue, Chicago, Illinois.

The police report in recommending the disapproval states as follows:

"Applicant is the owner of twelve bowling alleys at 1501 Berwyn Avenue, second floor, since September, 1954. They wish to install a cocktail lounge in connection with this business. The location is 16 feet directly across the alley from the First Evangelical Free Church. Attached is a copy of letter received from Lester N. Hedstrom, Church Secretary. They object to the cocktail lounge in connection with this business. Attached is a diagram of both properties, the location being less than 100 feet from the church."

The petition of the Attorneys for the corporation contends that an error was made in disapproving the application for the following reasons:

1. That the area in which the liquor is to be sold, not yet constructed, is to be carved out of an area of the second floor of the premises in which the bowling alleys are now located and is to be built as a separate and distinct unit, 128'9" from the nearest wall of the church building.
2. Sale and consumption of the liquor is to be confined strictly to the built-in, newly-constructed premises. In no event is liquor to be sold in the bowling alley nor any consumed there.
3. The entrance to the bowling alley is located 129 feet and 2 inches from the nearest entrance to the church.
4. The character of the neighborhood is highly commercialized and the rear of the building in which the bowling alley is contained and the rear of the church are of solid brick construction, straight up and down without windows and other openings except the fire escape exits.

The petition is accompanied by plats drafted by a registered architect, showing among other things the distances and photographs, showing the church, the building in which the bowling alley is contained and the immediate surrounding area. None of the reasons given by the petitioner are material.

Section 8 of Article VI of the Illinois Liquor Control Act provides in its pertinent part relating to the petition and opinion as follows:

"No license shall be issued for the sale at retail of any alcoholic liquor within 100 feet of any church * * *."

Section 147-6 of the Municipal Code of Chicago reads as follows:

"A city retailer's license for the sale of alcoholic liquor shall be issued by the mayor, as the local liquor control commissioner, subject to the provisions of an act entitled 'An Act relating to alcoholic liquors,' approved January 31, 1934, as amended, and subject to all laws and provisions of this code relating to licenses in general not inconsistent with the law relating to alcoholic liquor."

The applicant, Ball-N-Pin, Inc., is a corporation formed, according to the application, to own and operate bowling alleys and other amusement devices and equipment and to carry on the business of furnishing entertainment and recreation to the public, etc. The principal kind of business as stated by the applicant is the operation of a bowling alley and the measurements show that the said bowling alley is separated from the church by the width of the public alley between the two buildings, a maximum of sixteen feet.

The reasons advanced by the petitioner in our opinion do not change the situation. The distance from the church to the entrance to the bowling alley, or to the separate area in which it is represented that the sale and consumption of liquor is to be confined, and the alleged character of the neighborhood, and the solid brick construction of the rear of the two buildings are not the controlling factors, either singularly or collectively.

In *Smith v. Ballas*, 335 Ill. App. 418, the building for which a liquor license was sought was situated 101 feet and 1 inch from a high school building and 87 feet and 8 inches from the nearest point of the real estate on which the building was located. The issue involved was whether the word "school" in Section 127 meant the structure or the real estate. The court referred to Paragraph 94 of the Act, requiring liberal construction in the interest of the public welfare. It said, at page 421:

"The primary purpose of statutory construction is to ascertain the legislative intent, by examining not only the language employed,

but the evil to be remedied and the end to be attained (*U. S. Industrial Alcohol Co. v. Nudelman*, 375 Ill. 342). It would seem that the legislature, by the very act of legislating on the subject and enacting paragraph 127, was not unmindful that a tavern does not furnish a wholesome environment for school children."

Likewise the sale of alcoholic liquor on the subject premises does not furnish a wholesome environment for a church.

It is, therefore, our opinion that the disapproval of the application by the Liquor Control Commissioner for the reason that the location of the premises is less than 100 feet from a church is sound and in accordance with the facts and the law.

PRIVATE CLUB

(No. 12089—Commissioner of Police—H. A. I.—November 19, 1956.)

This acknowledges receipt of your recent communication transmitting an application of the Serbian Cultural Club "St. Sava" of 448 Barry Avenue, Chicago, Illinois, for a license to sell alcoholic liquor for sale to members only. You request our opinion as to whether or not the Serbian Cultural Club "St. Sava" qualifies for the \$50.00 license fee provided for by the City ordinance.

Chapter 147-4 of the Municipal Code of the City of Chicago, the ordinance in question, provides as follows:

"The fee for a city retail liquor dealer's license shall be four hundred and sixty-five dollars for the whole or any portion of the license period for which application is made. Provided, that in the case of a lodge or local chapter or corresponding unit of any fraternal order or other association of a kindred nature which is national or state-wide in organization or character, or any body, the membership of which is comprised of persons who have served in the military or naval services of the United States, and which are organized under the 'General Not for Profit Corporation Act' of the state of Illinois and which has been in active and continuous existence for at least three years prior to the date on which application for license is filed and which in good faith maintains a membership roll during said three-year period and has, at the time application is filed, more than fifty members with dues paid to date, and which is the owner, licensee, or occupant of an establishment operated solely for objects of a national or state-wide social, patriotic, recreational, benevolent purpose or the like, but not for pecuniary gain or profit, and the property as well as the advantages of which belong to all the members thereof, the fee for a city retail liquor dealer's license for the sale to members only shall be fifty dollars for the whole or any portion of the license period for which application is made."

Chapter 147-1 of the Municipal Code of the City of Chicago provides as follows:

"All words and phrases used in this chapter are defined in an act entitled 'An Act relating to alcoholic liquors,' approved January 31, 1934, as amended, shall have the meaning accorded to such words and phrases in said act." (Illinois Liquor Control Act.)

Chapter 147-6 of the Municipal Code of Chicago provides in part as follows:

"A city retailer's license for the sale of alcoholic liquor shall be issued by the mayor, as the local liquor control commissioner, subject

to the provisions of an act entitled 'An Act relating to alcoholic liquors,' approved January 31, 1934, as amended * * * (Illinois Liquor Control Act.)

Since it appears that all liquor licenses authorized under Chapter 147 must be issued subject to the provisions of the Illinois Liquor Control Act, our first inquiry is, therefore, directed to a determination of whether the Serbian Cultural Club "St. Sava" meets the requirements of a club as set forth in the State Liquor Act.

Section 21 of Article VI of the State Act provides in part as follows:

"No person shall receive a local license to sell alcoholic liquor on any premise * * * as a club unless it has the qualifications * * * described in * * * Section 2.24 of Article 1 * * *"

Section 2.24 of Article 1 of the State Act provides as follows:

"'Club' means a corporation organized under the laws of this State, not for pecuniary profit, solely for the promotion of some common object other than the sale or consumption of alcoholic liquors, kept, used and maintained by its members through the payment of annual dues, and owning, hiring or leasing a building or space in a building, of such extent and character as may be suitable and adequate for the reasonable and comfortable use and accommodation of its members and their guests and provided with suitable and adequate kitchen and dining room space and equipment and maintaining a sufficient number of servants and employees for cooking, preparing and serving food and meals for its members and their guests; provided, that such club files with the local liquor control commissioner at the time of its application for a license under this Act two copies of a list of names and residences of its members, and similarly files within ten (10) days of the election of any additional members his name and address; and, provided further, that its affairs and management are conducted by a board of directors, executive committee, or similar body chosen by the members at their annual meeting and that no member or any officer, agent, or employee of the club is paid, or directly or indirectly receives, in the form of salary or other compensation any profits from the distribution or sale of alcoholic liquor to the club or the members of the club or its guests introduced by members beyond the amount of such salary as may be fixed and voted at any annual meeting by the members or by its board of directors or other governing body out of the general revenue of the club. Added by act approved August 3, 1949."

For the purpose of showing that it qualifies as a club under the provisions of the Illinois Liquor Control Act, and for the further purpose of establishing that it comes within the purview of the provisions of Chapter 147-4 above quoted, the applicant has submitted the following affidavit dated June 26, 1956, signed by Slobodan M. Draskovich, President, and Kosta Radosavljevich, Secretary, which reads in part as follows:

"The following statements are made as supplementary to and part of an application concurrently made for a City Retailer's Alcoholic Liquor license.

1. Applicant's corporate names Serbian Cultural Club, 'St. Sava'. (As shown in application for license.)
2. Location of premises 448 Barry Avenue, Chicago, Illinois. (As shown in application for license.)
3. Is applicant a lodge or local chapter or corresponding unit of a fraternal order or other association of Kindred nature? Yes. If so, describe fully. We have branches in several states of the United States and in Europe.

4. Is the organization national in character? Yes. Statewide in character? See affidavit attached.
5. Is the organization a body the membership of which is comprised of persons who have served in the military or naval services of the United States? No.
6. Is the body organized under the 'General Not for Pecuniary Profit Corporation Act' of the State of Illinois? Yes. If so, answer the following:
 - (A) Date so organized: December 19, 1951.
 - (B) Has the incorporated organization been in active and continuous existence for at least three years prior to the date on which application for license is filed? Yes. Since what date? December 19, 1951.
 - (C) Does said organization maintain a membership roll during said three-year period and have, at the time application is filed, more than fifty members with dues paid to date? Yes.
7. Is the establishment for which license is sought operated solely for objects of a national or statewide social, patriotic, recreational, benevolent purpose or the like, but not for pecuniary gain or profit? Yes.
8. Does the property of the applicant organization as well as the advantages thereof belong to all of its members? Yes."

For the purpose of establishing that the Serbian Cultural Club "St. Sava" is a local unit of a national organization, the applicant has submitted an affidavit dated June 26, 1956, signed by Jerome M. Brooks, its attorney, which reads in part as follows:

"JEROME M. BROOKS, being first duly sworn on oath, deposes and says that he is the Attorney for the SERBIAN CULTURAL CLUB 'ST. SAVA', incorporated under the Not-for-Profit Act of the State of Illinois.

That he has knowledge of the facts herein and is familiar with the Corporation.

That he makes this Affidavit for the purpose of giving the necessary facts to the Office of the City Collector of Chicago, so as to establish with that Office the fact that the SERBIAN CULTURAL CLUB 'ST. SAVA', is an Illinois Not-For-Profit Corporation and is national in scope.

Affiant states that in addition to the main chapter of this organization, located at 448 Barry Avenue, Chicago, Illinois, branches are located at 306 South 71st Street, Milwaukee 14, Wisconsin; 1104 Connecticut Street, Gary, Indiana; 49 West Arizona, Detroit 3, Michigan; 830 Grove Street, Elizabeth, New Jersey; and 6007 Luther Street, Cleveland, Ohio."

From the information set forth in the affidavits and from the statements appearing in the application, it appears that the applicant is a local unit of a national association organized under the general "Not For Profit Corporation Act" of the State of Illinois for a period of three years prior to date of the filing of its application and has more than fifty members with dues paid up-to-date and is operating solely for benevolent and cultural activities and is a bona fide club as defined in Section 2.24 of Article 1 of the Illinois Liquor Control Act.

It is, therefore, our opinion that based upon the information set forth in the application and in the attached affidavits, the Serbian Cultural Club "St. Sava" is qualified under Chapter 147-4 of the Municipal Code of the City of Chicago to receive a license to sell alcoholic liquors to its members only on the premises located at 448 Barry Avenue, at the special license fee fixed at \$50.00.

PRIVATE CLUB—LOCATED NEAR CHURCH

(No. 12097—Commissioner of Police—H. A. I.—December 19, 1956.)

This acknowledges receipt of your communication of November 26, 1956, requesting our opinion as to whether the issuance of a retail liquor license would be proper to the Quadrangle Club of 1155 East 57th Street in the City of Chicago. Attached to your communication are reports of the 6th District which state that an application for a retail liquor license filed by the Quadrangle Club was disapproved by the Commanding Officer of the 6th District on the grounds that the premises occupied by the club at 1155 East 57th Street are approximately 65 feet from the Disciples Divinity House at 1156 East 57th Street, a college for the training of students for the Ministry, and approximately 80 feet from the First Unitarian Church of Chicago at 1174 East 57th Street.

Before considering the questions raised by your communication, we must first determine whether the Quadrangle Club is qualified to receive a retail liquor license.

Section 21 of Article VI of the Illinois Liquor Control Act provides in part as follows:

"No person shall receive a local license to sell alcoholic liquor on any premise * * * as a club unless it has the qualifications * * * described in * * * Section 2.24 of Article I * * *"

Section 2.24 of Article I of the Illinois Liquor Control Act provides as follows:

"'Club' means a corporation organized under the laws of this State, not for pecuniary profit, solely for the promotion of some common object other than the sale or consumption of alcoholic liquors, kept, used and maintained by its members through the payment of annual dues, and owning, hiring or leasing a building or space in a building, of such extent and character as may be suitable and adequate for the reasonable and comfortable use and accommodation of its members and their guests and provided with suitable and adequate kitchen and dining room space and equipment and maintaining a sufficient number of servants and employees for cooking, preparing and serving food and meals for its members and their guests; provided, that such club files with the local liquor control commissioner at the time of its application for a license under this Act two copies of a list of names and residences of its members, and similarly files within ten (10) days of the election of any additional member his name and address; and, provided further, that its affairs and management are conducted by a board of directors, executive committee, or similar body chosen by the members at their annual meeting and that no member or any officer, agent, or employee of the club is paid, or directly or indirectly receives, in the form of salary or other compensation any profits from the distribution or sale of alcoholic liquor to the club or the members of the club or its guests introduced by members beyond the amount of such salary as may be fixed and voted at any annual meeting by the members or by its board of directors or other governing body out of the general revenue of the club. Added by act approved August 3, 1949."

For the purpose of showing that it qualifies as a Club under the provisions of the Illinois Liquor Control Act, the applicant has submitted

the following affidavit dated November 30, 1956, signed by John I. Kirkpatrick, president of the Quadrangle Club, which reads as follows:

"John I. Kirkpatrick, being first sworn says:

I am president of the Quadrangle Club, 1155 East 57th Street, Chicago, referred to in this affidavit as the Club. The Club is a corporation under the laws of Illinois, not for pecuniary profit, organized and continuously in existence since 5/10/95 solely for the promotion of a common object other than the sale or consumption of alcoholic liquors. A majority of the Club's members are by rule persons affiliated with the University of Chicago. The object of the Club is to serve as a social and literary center.

The Club is kept, used, and maintained by its members through the payment of annual dues. The Club owns the three story building at the above address. It is suitable and adequate for the reasonable and comfortable use and accommodation of the Club's members. It includes billiard room, card rooms, locker rooms, library, solarium, large dining room and kitchen, and a series of bedrooms. The Club has occupied the building since 1922.

The Club maintains suitable and adequate kitchen and dining room space and equipment and maintains a sufficient number of servants and employees for cooking, preparing, and serving food and meals for the Club's members and their guests. Since occupying the building the Club has served an average of more than 150 meals every week day.

The Club has, as required by law, filed with its application for a license two copies of a list of names and residences of its members, and will file, within ten days of election, the name and address of any additional member.

The affairs and management of the Club are conducted by a board of directors chosen by the members at their annual meeting.

No member or officer, agent, or employee of the Club is or will be paid, or directly or indirectly receives or will receive, in the form of salary or other compensation, any profits from the distribution or sale of alcoholic liquor to the Club or its members or guests introduced by the Club's members, beyond the amount of such salary as may be fixed and voted at any annual meeting by the members or by its board of directors out of the general revenue of the Club."

From the information set forth in the affidavit and from statements contained in the application, it appears that the Quadrangle Club, a non-profit corporation, organized under the laws of the State of Illinois to serve as a social and literary center for its members occupying its present quarters since 1922, is a bona fide club and meets all the requirements as set forth in Section 2.24 of Article I of the Illinois Liquor Control Act.

We now turn to the question whether or not the disapproval of this application was proper on the basis of the proximity of the Quadrangle Club to the First Unitarian Church and the Disciples Divinity House.

Section 8 Article VI provides in part as follows:

"No license shall be issued for the sale at retail of any alcoholic liquor within 100 feet of any church, school, hospital, home for aged or indigent persons or for veterans, their wives or children or any military or naval station; *provided, that this prohibition shall not apply to hotels offering restaurant service, regularly organized clubs, or to restaurants, food shops or other places where sale of alcoholic liquors is not the principal business carried on, if such place of business so exempted shall have been established for such purposes prior to the taking effect of this Act (January 31, 1934) * * **" (Emphasis supplied.)

From a reading of the proviso contained in this section, it is clear that the legislature intended to create two distinct categories of exempted establishments.

1. Hotels offering restaurant service; Regularly organized clubs.
2. Restaurants, Food Shops or other places where sale of alcoholic liquor is not the principle business carried on in such place of business, if such place of business has been established for such purpose prior to January 31, 1934 the effective date of the Illinois Liquor Control Act.

Although this specific point has not been passed upon by any of our Courts of Review, it is our view that a regularly organized club is exempt from the 100 foot prohibition regardless of whether it may have been established prior to or subsequent to January 31, 1934, the effective date of the Illinois Liquor Control Act. While we are not called upon to make such a determination in this matter since the club in question was established at its present location in 1922, we wish, however, to point out that Rule 8, Section I, of the Rules and Regulations of the Illinois Liquor Control Commission, promulgated June 24, 1952 and filed with the Secretary of State June 28, 1952, support our conclusions in this respect.

Rule 8 in part provides as follows :

"Rule 8. CLUBS. An organization purporting to be a club is not actually one, nor is it entitled to the privileges granted clubs, unless it conforms to all the requirements of the definition of a club found in Article I, Section 2.24 of the Act, even though it may have been organized as a corporation not for pecuniary profit under the laws of this State.

The only exceptions made in favor of and the only privileges granted clubs, not granted other licensees, by the Act are as follows :

- (1) A club may be licensed within 100 feet of a church, school or hospital. (Article VI, Section 8.) * * *

It is, therefore, our opinion that the proximity of the Quadrangle Club to the Disciples Divinity House, 1156 East 57th Street, and the First Unitarian Church of Chicago, 1174 East 57th Street, is not a bar to the approval of its application for a retail liquor license for its premises located at 1155 East 57th Street.

APPLICANT—PRIOR FEDERAL CONVICTION

(No. 12110—Deputy Liquor Control Commissioner—H. A. I.—March 4, 1957.)

This acknowledges receipt of your recent communication transmitting an application of Anthony M. DeBrizzo for a retail liquor license for the premises located at 3753 W. 63rd Street in the City of Chicago, which had been disapproved by the Commissioner of Police on January 14, 1957, on the grounds that the applicant had been convicted on February 13, 1953, in the United States District Court for the Northern District of Illinois on the charges of possession of property stolen from interstate shipment and had been placed on probation for a period of two years.

Your communication points out that attorneys for the applicant have requested that this application be reviewed on the grounds that the conviction in Federal Court should not be a bar to the approval of the application.

Accompanying your communication is a letter from John J. Collins, Deputy Chief U. S. Probation Officer for the United States District Court, addressed to the Commissioner of Police stating that on November 4, 1952, Anthony DeBrizzo entered a plea of guilty to the charges of violation of Section 659, Title 18 U. S. Code (Theft and possession of goods stolen from Interstate Shipment) before the Honorable Phillip L. Sullivan in the United States District Court. On February 13, 1953, Anthony DeBrizzo was placed on probation for a period of two years. The letter further points out that a considerable amount of merchandise had been stolen from the Baltimore and Ohio Railroad Company by several of their regular employees; that two of these employees were patrons at a tavern operated by DeBrizzo and subsequent to the theft, they brought two Johnson outboard motors and sold them to DeBrizzo for the sum of \$40.00 each; that the same evening DeBrizzo resold these motors to another patron in the tavern for \$50.00 each and that during the period of probation, he made complete restitution to the Baltimore and Ohio Railroad Company for the loss they sustained in the sale of these motors. On February 13, 1955, the matter in the Federal Probation Department was closed as DeBrizzo had complied with conditions of probation and had made "a very satisfactory adjustment to society".

You request that we render an opinion as to the propriety of disapproving the application of DeBrizzo for a retail liquor license for the above mentioned premises.

Section 2 of Article VI of the Illinois Liquor Control Act deals with grounds which render a person ineligible to receive a retail liquor license and those which are relevant to our present inquiry, provide as follows:

"Section 2. No license of any kind issued by the State Commission or any local commission shall be issued to: * * *

(2) A person who is not of good character and reputation in the community in which he resides;

(4) A person who has been convicted of a felony *under the laws of the State of Illinois*; (Emphasis added)

(6) A person who has been convicted of pandering or other crime or misdemeanor opposed to decency and morality;

(12) A person who has been convicted of a violation of any Federal or State law concerning the manufacture, possession or sale of alcoholic liquor, subsequent to the passage of this Act, or shall have forfeited his bond to appear in court to answer charges for any such violation.* * *

The question before us, therefore, is whether the applicant by virtue of the conviction in Federal Court is ineligible to receive a liquor license in the City of Chicago.

The charge of violating the federal statute upon which the applicant was convicted in Federal Court cannot be considered a "felony under the laws of the State of Illinois" nor is it a "crime opposed to decency and morality". As we pointed out in *Opinions of Corporation Counsel*, Volume 23, page 436, Opinion No. 11506, crimes in this category are those involving rape, indecent exposure, operating a house of ill fame and other similar offenses opposed to decency and morality. Obviously the conviction under consideration is not one involving a violation of any Federal or State Law concerning the manufacture, possession or sale of alcoholic liquor.

The sole question remaining therefore is whether such conviction has rendered the applicant a person who is not of good character and reputation in the community in which he resides.

While there are no decisions of our courts of review construing the provisions of the Liquor Act relating to character and reputation, the Il-

Illinois State Liquor Control Commission in an opinion dated January 12, 1953, in the matter of *Bohemian Brewing Company*, held that Subdivision 2 of Section 2 of Article VI, of the Liquor Act is construed as meaning that an inquiry concerning the reputation and character of an applicant for a liquor license should be directed towards *his present reputation and character* to ascertain whether he would conduct operations in conformity with law and the public good if he were permitted to deal in intoxicating liquor; that where an applicant has acquired a good reputation in the community in which he resides among persons of admitted high standing with whom he associates and deals, the applicant should be granted a license, notwithstanding his questionable past.

In his letter to the Commissioner of Police, the Deputy Chief U. S. Probation Officer points out that "During the period of probation, prior to, and up until his present application for license, he (DeBrizzo) was operating a tavern and my personal investigation revealed that he operated his place of business in good order. His character and reputation in the community were very satisfactory. * * * Our investigations during supervision of this man has indicated that except for this difficulty, he has been an upright citizen."

The conclusions of the Deputy Chief Probation Officer based upon his personal investigation that the applicant, Anthony M. DeBrizzo, has shown real reformation subsequent to his conviction and that the applicant's "character and reputation in the community were very satisfactory" are persuasive. In the absence of any information to the contrary, we are constrained to accept his conclusions.

Having ascertained that DeBrizzo's present reputation and character are good in the community in which he resides, we must conclude that he is not ineligible for a license on the basis of the tests laid down in the *Bohemian Brewing Company* decision referred to above.

It is therefore our opinion that the application of Anthony M. DeBrizzo for a retail liquor license for the premises located at 3753 W. 63rd Street, should not be disapproved on the grounds of his conviction in Federal Court on February 13, 1953, on charges of violating Section 659, Title 18 U. S. Code.

ONE HUNDRED FEET FROM Y. M. C. A.

(No. 12122—Commissioner of Police—H. A. I.—May 24, 1957.)

This acknowledges receipt of your recent communication transmitting a report from the 6th District relative to the application of one Norbert Rosenthal for a retail liquor license for the premises located at 1411 E. 53rd Street in the City of Chicago.

This report points out that the proposed location at 1411 E. 53rd Street is within 100 feet of the premises occupied by the Hyde Park Young Men's Christian Association at 1400 E. 53rd Street. You request us to advise you "if this situation falls within the purview of Section 8 of Article VI of 'An Act Relating to Alcoholic Liquors?'"

Section 8 of Article VI of the Illinois Liquor Control Act provides in part as follows:

"No license shall be issued for the sale at retail of any alcoholic liquor within 100 feet of any church, school, hospital, home for aged or indigent persons or for veterans, their wives or children or any military or naval station.* * *"

From our investigation, we have ascertained that the Hyde Park Young Men's Christian Association occupies a five story structure at 1400 E. 53rd

Street in which it operates a hotel of 280 rooms rented to male persons up to the age of 45 years, as well as a restaurant which is open to the public; that in this building, the Hyde Park Young Men's Christian Association offers non-accredited courses to high school graduates in such commercial subjects as typewriting, shorthand, bookkeeping and some languages; that the Hyde Park Young Men's Christian Association also provides recreational facilities for boys and young men such as swimming, gymnastics, art crafts and a variety of club activities.

The question presented for our consideration is whether the Hyde Park Young Men's Christian Association is a school within the meaning of Section 8 of Article VI of the Illinois Liquor Control Act.

Since neither the Illinois Liquor Control Act nor the Illinois courts of review have defined the term school as used in Article VI, we must look elsewhere for such a definition.

In an opinion dated September 7, 1947, Opinions of the Corporation Counsel Volume 22, page 242, in response to a request from the Mayor's Office that we pass on the question as to whether a day nursery is considered a school and entitled to the protection of Section 8 of Article VI, we stated as follows:

"When passing the Liquor Control Act, the legislature did not define the word school so we are required to give the word its common meaning. This we have always understood to be a public or parochial grade school not including institutions of higher learning or trade schools."

In 30 American Jurisprudence, Section 346, page 437, under the title "Intoxicating Liquors", the following relevant statement of law appears from which we quote in part as follows:

What Constitutes School or Schoolhouse.—"The term 'schoolhouse,' as used in these statutes (liquor control) has been declared to apply primarily to common public schools devoted to such general elementary and intermediate instruction as is adapted to the education of children and youth, and perhaps secondarily to such semipublic and private schools as are conducted for the same purposes; it does not include a building maintained by a hospital as a training school for nurses, which is registered with the state board of regents, and admits as pupils only adult women, or so-called schools for boxing, or for giving instruction in dancing or physical culture, nor private business and commercial institutes.* * *

The leading case on this point cited under Section 346 referred to above is *Matter of Townsend*, 195 N. Y. 214, 88 N. E. 41, holding that a statute prohibiting the sale of alcoholic liquor within 200 feet of a school would not include a building used as a training school for nurses. In this case, the New York court on page 43 stated as follows:

"This phase of the statute indicates that the Legislature in using the term 'schoolhouse' had in view primarily the common public school devoted to such general elementary and intermediate instruction as is adapted to the education of our children and youth and perhaps secondarily such semipublic and private schools as are conducted for the same purpose. Broadly classified this includes all 'schoolhouses' in which our so-called grammar and high schools are conducted. While we can find no express warrant in the words of the statute for placing private and semipublic schools in the same category with common public schools, we are satisfied that it was not the intention of the Legislature to exclude the former from its wholesome protection. That is the utmost limit, however, to which the language of the statute can be extended. The evident intention of the Legislature was to remove the masses of our school-going children and youth as far as possible from the influences of the

liquor traffic, and the most effective means of accomplishing this end was thought to be the interdiction of the traffic within a certain radius surrounding the ordinary schoolhouse. It is obvious that, unless we draw a line with reference to schoolhouses at the point thus indicated, we must go to the extreme length of holding that the term 'schoolhouse' includes every place where instruction is given of any kind of degree, and to persons of any age. These considerations applied to the conceded facts of this case lead us to conclude that a building used as a training school for nurses is not a schoolhouse within the purview of the liquor tax law."

From the facts set out above, it is apparent that the building occupied by the Hyde Park Young Men's Christian Association is primarily devoted to providing living quarters for some 280 male persons. The business courses offered by the association, identical to those taught in private business or commercial institutes are non-accredited and limited to high school graduates. The recreational and club facilities it offers to boys and young men are generally not considered part of the conventional public school curriculum but would be regarded as "extra curricular" activities.

Applying the reasoning followed in our earlier opinion and the cited authorities, we must conclude that the Hyde Park Young Men's Christian Association located at 1400 E. 53rd Street is neither a public nor parochial grade or high school and cannot be considered a "school" within the purview of Section 8 of Article VI of the Illinois Liquor Control Act and hence is not entitled to the protection of its provisions.

It is therefore our opinion that the proximity of the proposed retail liquor establishment at 1411 E. 53rd Street to the Hyde Park Young Men's Christian Association at 1400 E. 53rd Street, would be no bar to approval of the application in question. If the applicant, Norbert Rosenthal, is otherwise qualified, it would not be improper to issue him a retail liquor license for the aforesaid premises.

EXECUTIVE CLEMENCY

(No. 12180—Commissioner of Police—H. A. I.—November 19, 1957.)

This acknowledges receipt of your communication of November 5, 1957, transmitting the application of one Jacob Rosen for a retail liquor license for the premises located at 1700 W. Roosevelt Road in the City of Chicago. This application had been disapproved by the Commanding Officer of the 23rd District on the basis of applicant's answers to questions in said application and information contained in attached Bureau of Investigation report disclosing that on March 2, 1928, Jacob Rosen had received a one year probation sentence in the Criminal Court of Cook County on a robbery charge to "a plea of petty larceny". Also transmitted is a copy of a decree of Executive Clemency dated July 17, 1957, granted to the applicant, Jacob Rosen, by the Governor of the State of Illinois, reading as follows:

"To THE Clerk of the Criminal Court, Chicago Greeting: Whereas, JACOB ROSEN ALIAS JACK ZIAN was convicted of the crime of LARCENY, CASE No. 44134 at the MARCH Term, A. D. 1928, of the Criminal Court of Cook County, and was sentenced therefor to 1 year probation, and Whereas, it has been represented to me that said JACOB ROSEN ALIAS JACK ZIAN is a fit and proper subject for Executive clemency.

Now, Know Ye, that I, William G. Stratton, Governor of the State of Illinois, by virtue of the authority vested in me by the Con-

situation of this State, do by these presents P A R D O N the said JACOB ROSEN ALIAS ZIAN of the said crime of LARCENY, CASE NO. 44134 of which he stands convicted and he is hereby acquitted and discharged of and from all further imprisonment and restored to all his rights of citizenship which may have been forfeited by his conviction.

In Testimony Whereof, I have hereunto set my hand and caused to be affixed the Great Seal of State at the Capitol in the City of Springfield this 17th day of JULY in the year of our Lord, one thousand nine hundred and FIFTY SEVEN, and of the State of Illinois the one hundred and THIRTY-NINTH."

You request our opinion as to whether "the Executive Clemency is recognized by the City of Chicago, as abrogating the criminal record of Jacob Rosen".

Preliminary to answering your query, we must determine whether the conviction of the applicant, Jacob Rosen, on March 2, 1928, is such as to disqualify him from receiving a liquor license under the provisions of the Illinois Liquor Control Act.

Section 2 of Article VI of the Illinois Liquor Control Act dealing with grounds rendering a person ineligible to receive a retail liquor license provides in part as follows:

Persons ineligible to license. § 2. "No license of any kind issued by the State Commission or any local commission shall be issued to:

(4) A person who has been convicted of a felony under any Federal or State law;

(5) A person who has been convicted of being the keeper or is keeping a house of ill fame;

(6) A person who has been convicted of pandering or other crime or misdemeanor opposed to decency and morality;

(12) A person who has been convicted of a violation of any Federal or State law concerning the manufacture, possession or sale of alcoholic liquor, subsequent to the passage of this Act, or shall have forfeited his bond to appear in court to answer charges for any such violation;"

An examination of the transmitted application discloses that in response to question No. 16-A (e) of the questionnaire, "Have you ever been convicted of any felony under any Federal or State law?", the applicant answered in the affirmative. The record of the Bureau of Identification indicates that the conviction was entered on "a robbery plea to petty larceny".

In order to ascertain the precise finding entered against the applicant on March 2, 1928, we have obtained a certified copy of the proceedings in the case of *People in the State of Illinois v. Jack Zian alias Jacob Rosen*, Case No. 44314, from the Clerk of the Criminal Court of Cook County, which we attach hereto which discloses the following: That an indictment was returned in the Criminal Court of Cook County against Jacob Rosen alias Jack Zian charging him with robbery; that on February 20, 1928, on motion of the State's Attorney, the court order that the felony charge in the indictment be waived; that the defendant entered a plea of guilty to a charge of larceny and the court entered an order finding the defendant, Jack Zian, guilty of larceny, value of property stolen to be \$14.00; that on March 2, 1928, the court entered an order sentencing the said Jack Zian to probation for a period of one year on the aforesaid charge of larceny.

It would appear that the applicant has been laboring under an erroneous impression that his conviction in 1928 was on a charge of robbery, which is a felony under the laws of Illinois and which would have disqualified him from receiving a retail liquor license under the State Liquor Act. Actually,

he was convicted of petty larceny which is not a felony but a misdemeanor under the laws of Illinois.

On the question of whether the conviction on a charge of petty larceny would render an applicant ineligible for a retail liquor license, we direct your attention to an opinion dated April 30, 1952, Opinions of Corporation Counsel, Volume 23, Page 436, Opinion No. 11506, addressed to the then Commissioner of Police, wherein we held that a prior conviction of petty larceny by an applicant for a retail liquor license would not disqualify such applicant from receiving a retail liquor license. We likewise pointed out in that opinion that petty larceny cannot be considered "a crime or misdemeanor opposed to decency and morality"; that crimes in this category are those involving rape, indecent exposure, operating a house of ill fame and other similar offenses opposed to decency and morality. Since the 1928 conviction of Rosen occurred prior to 1934, the date of the enactment of the State Liquor Act, we need not consider whether he has been "convicted of a violation of any * * * state law concerning the manufacture, possession or sale of alcoholic liquor *subsequent* to the passage of this Act."

Under the above holding, we must conclude that the conviction of March 2, 1928, on the charge of petty larceny would not render the applicant ineligible for a retail liquor license.

Having disposed of the matter of the applicant's eligibility, we would not deem it necessary for the purpose of this opinion to consider the question raised in your communication as to whether Executive Clemency or Pardon should be recognized by the City of Chicago as abrogating an applicant's criminal record. However, since this question is a recurrent one, we wish to point out for your future guidance that we have previously ruled on this precise query. In an opinion dated August 18, 1937, addressed to the Deputy Local Liquor Control Commissioner of the City of Chicago, Opinions of Corporation Counsel, Volume 19, Page 122, Opinion No. 9595, in response to a request as to the propriety of granting a retail liquor license to an applicant who had been convicted of manslaughter and thereafter pardoned by the Governor of the State of Illinois, we held after citing legal authorities that such a retail liquor license may be granted to a person who although convicted of a felony had been pardoned *since the legal effect of a pardon is to blot out the offense and release the recipient of such pardon from all disabilities imposed by the conviction and to restore him to all his civil rights.*

Had the applicant been convicted of robbery, the original charge placed against him, a felony under the laws of Illinois, our answer to your inquiry would be that the legal effect of the Executive Clemency or Pardon in such event would have been to wipe out the offense and release him from the disability imposed under Sub-section 4 of Section 2 of Article VI of the State Liquor Act above quoted. Under such circumstances, it would then become incumbent upon the City to recognize the legal effects of such pardon.

In view of our previous ruling of April 30, 1952, it is our opinion that it would not be improper to approve the application of Jacob Rosen for a retail liquor license for the premises located at 1700 W. Roosevelt Road, if the applicant is otherwise qualified and the premises meet all the necessary legal requirements.

RESIDENCE OF CORPORATE OFFICERS

(No. 12189—P. P.—H. A. I.—December 9, 1957.)

This acknowledges receipt of your communication of November 26, 1957, addressed to this office wherein you state that you are the attorneys for a corporation licensed to operate a tavern in the City of Chicago whose officers are all residents of Chicago; that the treasurer of the licensed corporation

contemplates moving his residence to Glencoe, Illinois. You conclude by requesting us to advise you whether this change would "in any way affect the license or whether they need a local resident for a corporation officer".

To answer your inquiry, we must examine the pertinent provisions of the Illinois Liquor Control Act, Chapter 43, Illinois Revised Statutes, which is the paramount law controlling in this matter. Section 2 of Article VI of this Act enumerates grounds rendering a person ineligible for a retail liquor license and provides as follows:

"Persons ineligible to license. § 2. No license of any kind issued by the State Commission or any local commission shall be issued to:

(1) *A person who is not a resident of the city, village or county in which the premises covered by the license are located; except in case of railroad or boat licenses;*

(2) *A person who is not of good character and reputation in the community in which he resides;*

(3) *A person who is not a citizen of the United States;*

(4) *A person who has been convicted of a felony under any Federal or State law;*

(5) *A person who has been convicted of being the keeper or is keeping a house of ill fame;*

(6) *A person who has been convicted of pandering or other crime or misdemeanor opposed to decency and morality;*

(7) *A person whose license issued under this Act has been revoked for cause;*

(8) *A person who at the time of application for renewal of any license issued hereunder would not be eligible for such license upon a first application;*

(9) *A copartnership, unless all of the members of such copartnership shall be qualified to obtain a license;*

(10) *A corporation, if any officer, manager or director thereof, or any stockholder or stockholders owning in the aggregate more than five per cent (5%) of the stock of such corporation, would not be eligible to receive a license hereunder for any reason other than citizenship and residence within the political subdivision.*

(11) *A person whose place of business is conducted by a manager or agent unless said manager or agent possesses the same qualifications required of the licensee;*

(12) *A person who has been convicted of a violation of any Federal or State law concerning the manufacture, possession or sale of alcoholic liquor, subsequent to the passage of this Act, or shall have forfeited his bond to appear in court to answer charges for any such violation;*

(13) *A person who does not own the premises for which a license is sought, or does not have a lease thereon for the full period for which the license is to be issued.*

(14) *Any law enforcing public official, any mayor, alderman or member of the city council or commission, any president of the village board of trustees, any member of a village board of trustees, or any president or member of a county board; and no such official shall be interested in any way, either directly or indirectly, in the manufacture, sale or distribution of alcoholic liquor." (Emphasis supplied.)*

It will be readily noted that while Sub-section 2 requires persons be residents of the political subdivision in which the premises covered by the license are located to qualify for a license, Sub-section 10 expressly exempts officers, managers, directors or stockholders of a corporate licensee from such residency requirement.

The City Liquor Dealers' Ordinance, Chapter 147 of the Municipal Code of Chicago, contains no provisions requiring officers or directors of a corporation to be residents of the City of Chicago to qualify such corporation for a retail liquor license.

In the light of the foregoing provisions of the Illinois Liquor Control Act, it is our opinion that a corporation does not become ineligible to hold a retail liquor license in the City of Chicago by reason of the fact that any of its officers may reside outside of the corporate limits of the City.

LICENSE FOR HOTEL NEAR A CHURCH

(No. 12226—Commissioner of Police—H. A. I.—May 26, 1958.)

This acknowledges receipt of your communication of May 20, 1958, transmitting the application for a retail liquor license of the Bel-Ray Building Corporation for the premises located at 1201 W. Belmont Avenue in the City of Chicago. You request our opinion as to whether or not you may properly approve this application since the premises in question are located within 100 feet of the Lake View Gospel Church at 3142 N. Racine Avenue.

From the information set out in the transmitted application, it appears that the applicant's principal business is that of a hotel and restaurant. Before considering the questions raised by your communication, we must first determine whether the Bel-Ray Building Corporation is qualified to receive a retail liquor license either as a hotel or as a restaurant.

Section 21 of Article VI of the Illinois Liquor Control Act provides in part as follows:

"No person shall receive a local license to sell alcoholic liquor upon any premises as a restaurant * * * unless it has the qualifications * * * described in Section 2.23 of Article I * * *"

Section 2.23 of Article I of the Illinois Liquor Control Act provides as follows:

" 'Restaurant' means any public place kept, used, maintained, advertised and held out to the public as a place where meals are served, and where meals are actually and regularly served, without sleeping accommodations, such space being provided with adequate and sanitary kitchen and dining room equipment and capacity and having employed therein a sufficient number and kind of employees to prepare, cook and serve suitable food for its guests."

Section 2.25 of Article I of the Illinois Liquor Control Act provides as follows:

" 'Hotel' means every building or other structure kept, used, maintained, advertised and held out to the public to be a place where food is actually served and consumed and sleeping accommodations are offered for adequate pay to travelers and guests, whether transient, permanent or residential, in which twenty-five (25) or more rooms are used for the sleeping accommodations of such guests and having one or more public dining rooms where meals are served to such guests, such

sleeping accommodations and dining rooms being conducted in the same building or buildings in connection therewith and such building or buildings, structure or structures being provided with adequate and sanitary kitchen and dining room equipment and capacity."

For the purpose of showing that it qualifies both as a hotel and a restaurant under the provisions of the Illinois Liquor Control Act, the applicant has submitted the following affidavit dated May 16, 1958, signed by Louis I. Teitelbaum, president of the Bel-Ray Building Corporation, which reads as follows:

"Louis I. Teitelbaum, being first duly sworn on oath, deposes and says he is the president of the Bel-Ray Building Corporation, a corporation organized under the laws of the State of Illinois on October 14, 1937, for the purpose of operating a hotel, restaurant, cafe, tavern and any and all other businesses usually carried on in conjunction with a hotel; that on October 14, 1937, the said corporation acquired the Bel-Ray Hotel located at 3150 N. Racine Avenue, Chicago, Illinois, from this affiant, Louis I. Teitelbaum, who had operated same since 1928; that said hotel consisting of 79 rooms occupies part of a four story structure, 50 feet by 125 feet, located at the Southwest corner of Belmont and Racine Avenues in the City of Chicago; that the East portion of the first floor of the Southwest corner is outfitted as a restaurant which is connected to the lobby of the Bel-Ray Hotel and offers restaurant service to the guests of said hotel; that the Bel-Ray Hotel structure was constructed in 1928 and has operated continuously to the present time.

That the said Bel-Ray Hotel is kept, maintained, advertised and held out to the public to be a place where food is actually served and consumed and sleeping accommodations are offered for adequate pay to travelers and guests in which 79 rooms are used for the sleeping accommodations of said guests and having a public dining room, to-wit, the aforementioned restaurant where meals are served to such guests, such sleeping accommodation and dining room all being conducted in the same building, said dining room being provided with adequate sanitary kitchen facilities.

That the aforementioned restaurant operated in conjunction with said Bel-Ray Hotel has likewise been in continuous operation since 1928 until 1957; that the aforementioned restaurant has been kept and maintained and advertised to the public as a place where meals are served and where meals are actually regularly served and space having been provided with adequate and sanitary kitchen and dining room equipment and having employed in said restaurant four employees to prepare, cook, and serve suitable food for its guests and patrons; that the principal business carried on in this restaurant is that of serving food for its guests and patrons; that there has been issued to the applicant corporation for the restaurant premises at 1201 W. Belmont Avenue, a City of Chicago Food Dispenser License No. 2055; that a retail liquor license had been issued by the City of Chicago to the premises located in the aforementioned hotel from 1934 through 1957.

Affiant makes this affidavit to induce the Local Liquor Control Commissioner of the City of Chicago to issue a retail liquor license to the Bel-Ray Building Corporation for the premises located at 1201 W. Belmont Avenue in the City of Chicago."

From the information set forth in the affidavit and from statements contained in the application, it appears that the Bel-Ray Building Corporation has been operating the Bel-Ray Hotel located at 3150 N. Racine Avenue in the City of Chicago since 1937, the date of its incorporation; that it acquired said hotel from Louis I. Teitelbaum, the present president of the corporation, who had operated it since its original construction in 1928; that

the hotel consisting of 79 rooms is housed in a four story structure located at the Southwest corner of Belmont and Racine Avenues; that the East portion of the first floor, is outfitted as a restaurant connected to the lobby of the Bel-Ray Hotel which offers restaurant service to the guests of the hotel; that the restaurant in question operated in conjunction with the hotel has been in continuous operation as a restaurant and food dispenser since 1928 until 1957; that in all respects the hotel and restaurant meet all the requirements as set forth in sections 2.23 and 2.25 of Article I of the Illinois Liquor Control Act.

We now turn to the question of whether or not the application of the Bel-Ray Building Corporation may be approved notwithstanding its proximity to the Lake View Gospel Church at 3142 N. Racine Avenue.

Section 8 of Article VI provides in part as follows :

*"No license shall be issued for the sale at retail of any alcoholic liquor within 100 feet of any church, school, hospital, home for aged or indigent persons or for veterans, their wives or children or any military or naval station ; provided, that this prohibition shall not apply to hotels offering restaurant service, regularly organized clubs, or to restaurants, food shops or other places where sale of alcoholic liquors is not the principal business carried on, if such place of business so exempted shall have been established for such purposes prior to the taking effect of this Act * * *"* (Emphasis supplied.)

In an opinion dated December 19, 1956, addressed to your office, relative to the propriety of issuing a retail liquor license to the Quadrangle Club, a duly organized club located within 100 feet of the First Unitarian Church of Chicago, we were called upon to construe the provisions of Section 8 of Article VI of the Illinois Liquor Control Act above cited and the application of these provisions to regularly organized clubs. Ruling that clubs were exempt from the 100 feet prohibition, we pointed out that by enacting the proviso contained in Section 8 of Article VI, the legislature intended to create two distinct categories of exempted establishments.

1. Hotels offering restaurant service; Regularly organized clubs.
2. Restaurants, Food Shops or other places where sale of alcoholic liquor is not the principal business carried on in such place of business, if such place of business has been established for such purpose prior to January 31, 1934, the effective date of the Illinois Liquor Control Act.

From the facts contained in the sworn application and the supporting affidavit, it appears that the applicant corporation not only qualifies as (a) a hotel offering restaurant service, but also as (b) a restaurant where the sale of alcoholic liquor is not the principal business carried on, which place of business had been established as a restaurant in 1928, prior to January 31, 1934, the effective date of the Illinois Liquor Control Act. In either case, following our ruling in the Quadrangle Club opinion, we must conclude that the applicant corporation is exempt from the 100 feet prohibition set forth in Section 8 of Article VI above quoted.

It is therefore our opinion that the proximity of the Bel-Ray Building Corporation to the Lake View Gospel Church is not a bar to the approval of its application for a retail liquor license, for its premises located at 1201 W. Belmont Avenue, if the applicant corporation is otherwise qualified.

LICENSE FOR BOAT AT NAVY PIER

(No. 12278—Corporation Counsel—H. A. I.—April 29, 1959.)

You have referred to my attention a communication, addressed to Mayor Richard J. Daley, from the Managing Director of the Chicago International Fair and Exposition wherein he informs the Mayor that the Association of Commerce and Industry has made plans to anchor a hospitality ship along the south wing of the Navy Pier during the duration of the Trade Fair from July 2 through July 18, 1959 and proposes to operate this ship as a private club, "serving snacks and liquor to members." "Membership would include exhibitors, trade officials, buyers, government officials and business men." The writer of the communication indicates that the Association desires a City Liquor License for the Hospitality Ship and that the Association is prepared to comply with all City license regulations. You request my views on any legal question raised in the communication and the propriety of issuing such a license.

I have studied the communication and can find no valid objections to the issuance of a city retail liquor license for this proposed operation.

Under the State Liquor Act the State Liquor Commission is given exclusive jurisdiction to license a boat, provided such boat or vessel is "a passenger boat regularly operated as a common carrier on navigable waters in this State, which boat maintains a public dining room or restaurant thereon." (Section 1 (f) Article V, Illinois Liquor Act.) Under those circumstances no local retail liquor license is required (Section 3, Article IV, Illinois Liquor Act). The boat licenses fall into the same classification as licenses to railroad cars and aeroplanes, which are ambulatory with no fixed location. Since the Hospitality Ship will operate as a stationary vessel, not engaged as a common carrier, the State Commission has no jurisdiction and we must look elsewhere for authority to license its operation.

The question of whether the City may require a license of a boat not actually operated as a common carrier has previously been considered by this office in situations which bear strong analogy to the problem confronting us. In an early opinion dated July 20, 1905, Opinions of Corporation Counsel, Vol. 3, p. 65, this office had occasion to consider whether the Columbia Yacht Club, then operating a clubhouse on piling in the waters of Lake Michigan within the City Harbor but situated less than three miles from the shore line, was required to obtain a City Retail Liquor License in order to dispense liquor to its members. The Yacht Club had contended that the City had no jurisdiction or control beyond its own limits and, therefore, could not control the use of the clubhouse, which was built in the navigable waters of Lake Michigan; that since the club held a federal liquor license, it was not necessary to be licensed by the City. In an opinion written by the late Maclay Hoyne the writer concluded that under the then existing statutes the City had jurisdiction upon all waters within three miles of the City and, therefore, the Yacht Club should be compelled to obtain a Dram-Shop license.

It is interesting to note that notwithstanding this ruling, some 30 years later, this office was again confronted with the question of whether the Columbia Yacht Club was required to obtain a City Liquor License in order to dispense liquor to its members.

In this latter opinion dated September 9, 1935 Opinion No. 8868, Opinions of the Corporation Counsel, Vol. 18, p. 688, this office held that the City could require a retail liquor license for a boat moored in a slip at the foot of E. Randolph Street. The factual situation involved in this opinion dis-

closed that the Columbia Yacht Club, in 1935, was occupying quarters in an old boat, which was moored in what was known as the Michigan Slip, at the foot of E. Randolph Street. The Club had secured a State liquor license but was operating without a City license. The opinion written by the late Col. Martin Foss (after the adoption of the present Liquor Control Act) correctly reasoned that since the boat in question was not being operated as a passenger boat regularly operated as a common carrier on navigable waters in this State that it was necessary for it to secure a City retail liquor license to dispense liquor.

The factual situations found in the two Columbia Yacht Club opinions are sufficiently similar to those presented in the communication in question as to be controlling.

Likewise, these opinions dispose of another question of whether a private club can receive a retail liquor license while operating from a boat moored in Lake Michigan. The Columbia Yacht Club, a private club, chartered in the State in 1905, was dispensing liquor to members and guests only. While this was not the primary question considered in either opinion, our rulings recognized that a private club, quartered on a moored boat, was eligible to be licensed by the City.

From the communication it appears that the Association intends to operate the Hospitality Ship as a private club and limit the patrons to a select group and will not be open to the general public. Normally, a licensee must sell to the general public unless it qualifies as a regularly organized club under the provisions of the Illinois Liquor Control Act (Section 2.24, Article I, Illinois Liquor Act). The Chicago Association of Commerce and Industry, who would be the applicant for the license in this matter as far as I have been able to ascertain, received a Charter from the Illinois Secretary of State in 1904 to operate as a non-profit organization and, consequently, could qualify as a private club.

The third objection which might be raised is whether the City can properly issue a liquor license to a boat anchored along the Navy Pier, where the sale of all alcoholic liquor, except beer, has been legally prohibited under Section 11 of Article VI of the Illinois Liquor Act. Pertinent parts of this Section provide as follows:

*"No alcoholic liquor shall be sold or served in a building belonging or under the control of the State or of any political subdivision thereof; * * * provided further that beer may be sold in any building belonging to or under the control of any city, * * * and said building is located upon a pier extending into or over the waters of a navigable lake. * * *"*
(Navy Pier.)

It will be readily seen that this prohibition applies only to "any building" under the control of the State or any political subdivision thereof located on the Navy Pier. Certainly this prohibition could not be construed to apply to a privately owned boat temporarily anchored or moored adjacent to it.

A fourth question which may conceivably be raised is the provision found in Section 8 of Article V, which provides in part as follows:

" * * No alcoholic liquor, other than beer, shall be sold for consumption on the premises within fifteen hundred feet from any building used for regular classroom or laboratory instruction on the main campus of any State university owned or maintained, in whole or in part, by the State of Illinois, and which is endowed by the proceeds of the sale of public lands set apart for that purpose by the Act of Congress of the United States of July 2, 1862, entitled, 'An Act donating public land to the several states and territories which may provide colleges for the benefit of agriculture and mechanic arts.' As amended by act approved May 16, 1945, p. 22."*

While the University of Illinois maintains an undergraduate division at the Navy Pier, it would appear that the above cited provision applies only to the "main campus" and not to a branch of any State university. The Navy Pier division of the State university is a branch not situated on the main campus of the University of Illinois, which is located in Champaign.

To recapitulate, I find no legal reason which could prevent the Mayor from legally issuing a retail liquor license to the proposed Hospitality Ship.

SEPARATE BARS ON SAME PREMISES

(No. 12303—City Collector—H. A. I.—October 28, 1959.)

This acknowledges receipt of your letter of August 19, 1959, transmitting a communication from attorneys representing A. J. Hausberg, who is the proprietor of the Milford Ballroom at 3309-11 North Pulaski Road. The communication points out that Hausberg has been licensed by City of Chicago to sell alcoholic liquors in connection with the operation of the ballroom and since the inception of the business in 1943 the City has required but one retail liquor license for the premises in question.

The communication further points out that on August 7, 1959, the Police Department charged Hausberg with violating Chapter 147-2 of the Municipal Code of the City of Chicago in that he operated "five separate bars, locations and places under the same roof" and failed "to obtain a separate city retailer's liquor license for each such location, place or premises".

You request our opinion as to whether only one city retailer's alcoholic liquor license is required for the premises in question under the provisions of Chapter 147-2 of the Municipal Code of Chicago.

Chapter 147-2 of the Municipal Code provides in part as follows:

"147-2. No person shall sell at retail any alcoholic liquor without first having obtained a city retailers license for each location, place, or premise where the retailer is located to sell the same.

Where two or more such locations, places or premises are under the same roof or at one street address, a separate city retailer's license shall be obtained for each such location, place, or premise; provided that nothing herein contained shall be so construed as to prevent any hotel operator licensed under the provisions of this chapter from serving alcoholic liquor to his registered guests in any room or part of his hotel, if such liquor so served shall be kept in and served from a licensed location, place, or premise in said hotel. * * *

The question presented for our consideration is whether the premises in question constitutes five separate locations as to require five separate licenses. Earlier we were presented with similar problems when requested by the Superintendent of the Bureau of License Enforcement to interpret the provisions of Section 3143B of the Retail Beverage Ordinance then in force, the forerunner of our present Liquor Ordinance and virtually identical in language with the provisions of Chapter 147-2, above quoted, which provided in part as follows:

"Section 3143-B of the Retail Beverage ordinance as amended June 28, 1933 and July 7, 1933, provides as follows:

'License Required.) No person, firm or corporation shall engage in the business of a retail beverage dealer without first having obtained a license for each stand, place, room or enclosure where such beverages

are purveyed or dispensed at retail. Where two or more stands, places, rooms or enclosures are located under the same roof or at one street address, separate licenses shall be required for each such stand, place, room or enclosure. * * *

In an authoritative opinion dated November 2, 1933 (Opinion No. 8199) (Opinions of Corporation Counsel, Volume XVIII, page 507), this office laid down the tests to be applied in determining whether one or more retail liquor licenses would be required in any given situation. The leading Illinois case on the subject is *Malkan v. City of Chicago*, 217 Ill. 471, where the Supreme Court had under consideration the City's Dram Shop Ordinance. In that case, the plaintiff Malkan had been granted a liquor license to keep a saloon at 178 Quincy Street in Chicago. He maintained two establishments, one on the main floor of the building at that number and one in the basement, each having separate equipment and catering to different clientele. They were not directly connected. The question arose there whether the City had lawfully compelled him to pay a second license fee for the saloon in the basement. The court held that the basement was a separate place and that Malkan had been properly required to pay two license fees. The court stated on page 418 of its opinion that:

"In 17 American and English Encyclopedia of Law (2d ed. p. 237), it is said: 'One license will not authorize the person or persons licensed to conduct the business in more than one place. A license is necessary for each place, in which the business is conducted.' (*State v. Walker*, 16 Me. 241; *Commonwealth v. Estabrook*, 10 Pick. 293.) It must be manifest from our statement of the facts, that the defendant is maintaining two places, each independent of the other in every material sense necessary to be considered. The mere fact that by his license he is authorized to carry on business in the building mentioned, cannot be construed to confer the right on defendant to cut such building up into separate rooms, the number to be limited only by the capacity of the building, or the extent of the premises, and in each maintain an independent place for the sale of liquors".

"* * * In a large city like Chicago, where there are immense buildings in the business district, it cannot be assumed that a man, who takes out a license to keep a saloon at a certain number, intends to open any number of saloons in the building, where such number is found."

The authors of our opinion then made the following pertinent observations from which we quote:

"Where, however, two or more places or rooms, even though located under the same roof or at one street address and owned and operated by the same person are so separate and distinct in location, character and clientele as fairly to be considered separate premises, each of such establishments would, in our opinion, require a separate license. It is of no material consequence that one beer dispensing outfit serves a number of separate stands, places, rooms or enclosures. The ordinance makes no distinction between stands, places, rooms or enclosures where bars are located and those where there are no facilities for storing, icing and drawing beer and wine."

From the information set out in the transmitted communication it appears that Hausberg has operated the Milford Ballroom continuously since 1943; that the premises occupying the entire second floor originally were unpartitioned; that following the LaSalle Hotel fire in 1947, to conform to an ordinance adopted by the City Council requiring enclosed stairways, Hausberg was compelled to make extensive alterations which necessitated interior changes and structural modifications resulting in partially closing off some of the interior space; that the structural changes in no wise affected the character of the operation; that the ballroom is known as the "Home of Over-Thirty Dance" catering to persons over the age of thirty. The communication points out that: "There is only one entrance to the second floor

and only those purchasing admission tickets to the ballroom are permitted to proceed up to the second floor, the only limitation being that each person must show some identification showing him or her to be over thirty years. After reaching the second floor, patrons are free to dance, circulate, sit or stand in any portion of the ballroom premises. Liquor dispensing stands are located conveniently in five different parts of the ballroom in order to avoid any congestion in any part of the floor which would interfere with dancing by the patrons. * * * In addition there is only one single set of toilet facilities which are located on the extreme north end of the ballroom. Patrons are free to circulate from one end of the ballroom to the other. There are no booths near the respective liquor dispensing stands but benches are located along the walls of the entire ballroom for the convenience of the patrons."

From an examination of the plat accompanying the transmitted communication, it appears that the premises in question occupy the entire second floor of the building located at the southeast corner of Milwaukee Avenue and Pulaski Road. The ballroom proper, fronting on Milwaukee Avenue, occupies a space of approximately 115 feet in length and 48 feet in width. In this area are located three liquor dispensing units. North of the ballroom is located a stairwell leading to the main floor. To the north of this stairwell, separated by a partition, fronting on Pulaski Road, is an areaway of approximately 70 feet in length and 30 feet in width, wherein are located two liquor dispensing units.

From a review of the information and data set out in the transmitted communication and from an examination of the plat, it is our opinion that the licensee has divided his establishment into two separate independent areas and is maintaining two separate locations, the portion embracing the ballroom proper and the portion north of the stairwell. This latter area is in our view a separate cocktail lounge with its own liquor dispensing units. Patrons coming up the stairwell from the main floor may enter this cocktail lounge and completely avoid the ballroom proper.

That the licensee Hausberg has regarded the ballroom as separate and distinct from the cocktail lounge area is evidenced by the fact that when applying for public place of amusement license for his establishment the space sought to be licensed was limited to the floor area occupied by the ballroom proper and did not cover any part of the second floor to the north of the stairwell.

Applying the tests set forth in the cited authorities and invoking a rule of reason, it is our opinion based upon the facts and data submitted to us that the establishment in question must be considered as two places within the meaning of Chapter 147-2 of the Municipal Code and consequently requires two retail liquor licenses.

KEY CLUBS

(No. 12326—Superintendent of Police—H. A. I.—March 21, 1960.)

Your communication of March 14, 1960 transmits a copy of a report of the commanding officer of the 35th Police District regarding the operations of private "Key Clubs", and you request our opinion relative to the matters therein contained.

The transmitted communication points out that the "International Playboy Club" of 116 E. Walton Place and the "Gaslite Club" of 11 E. Huron Street, both licensed by the City of Chicago as restaurants and retailers of alcoholic liquor, have conducted operations as exclusive private "Key Clubs",

limiting their patronage to persons who have either acquired membership or keys and that such persons are permitted to sign statements for alcoholic liquor to be charged to their accounts, according to the by-laws of their respective clubs; that investigation by the 35th District has disclosed that both "Clubs" are organized as corporations for profit. The transmitted communication concludes by requesting that answers be given to the following questions:

- "(a) Are these organizations or similar organizations admittedly not in the 'not for profit' category, actually private clubs and may they prevent non-members from entering their premises and purchasing food or liquor therein?
- "(b) May they permit non-members to enter, but require them to pay a cover charge while not requiring their 'members' to pay a similar cover charge?
- "(c) Are these organizations, 'clubs', as used in Par. 134, Chapter 43, which would permit them to have their members charged for drinks and food, rather than paying cash, or should all members and non-members be required to pay cash for drinks?
- "(d) May any liquor licensee maintain a locked door during operating hours, provided they open to all upon the ringing of a bell or buzzer, etc.?
- "(e) May these or similar liquor license organizations restrict patrons from entering by use of a key or a card or other method? Under what circumstances may this be done?
- "(f) How and who determines if an organization is actually not for profit?
- "(g) Some of these liquor license establishments which regard themselves as 'Clubs' attempt to avoid service of non-members by claiming their tables are reserved, despite the fact that tables are obviously available. Is this a violation?"

The Illinois Liquor Control Act, Chapter 43, Illinois Revised Statutes, is the basic law controlling in all matters pertaining to licensing and regulating of retail liquor establishments. Section 1 of Article II provides that no person shall sell, furnish or possess any alcoholic liquor for beverage purposes, except as specifically provided in this Act. The words "except as specifically provided in this Act" mean except under license or licenses provided for in the Act and in the manner set forth in the Act. Pertinent provisions of this Act and other relevant statutory enactments bearing upon the subject matter of your inquiry are set out below.

Section 21 of Article IV of the Illinois Liquor Control Act (Par. 95, Chap. 43, Ill. Rev. Stat.), provides as follows:

"REQUIREMENTS FOR RESTAURANT AND CLUB LICENSES. § 21.

No person shall receive a local license to sell alcoholic liquor upon any premises as a *restaurant* nor as a *club* unless it has the qualifications respectively described in Sections 2.23 and 2.24 of Article I * * *". (Emphasis ours.)

Section 2.23 of Article I of the Illinois Liquor Control Act (Par. 161, Chap. 43, Ill. Rev. Stat.), provides as follows:

"RESTAURANT DEFINED. § 2.23.

'Restaurant' means any public place kept, used, maintained, advertised and held out to the public, as a place where meals are served, and where meals are actually and regularly served, without sleeping accommodations, such space being provided with adequate and sanitary

kitchen and dining room equipment and capacity and having employed there a sufficient number and kind of employees to prepare, cook and serve suitable food for its guests * * *". (Emphasis ours.)

Section 2.24 of Article I of the Illinois Liquor Control Act (Par. 17, Chap. 43, Ill. Rev. Stat.), provides as follows:

"CLUB DEFINED. § 2.24.

*"Club means a corporation organized under the laws of this State, not for pecuniary profit, solely for the promotion of some common object other than the sale or consumption of alcoholic liquors, kept, used and maintained by its members through the payment of annual dues, and owning, hiring or leasing a building or space in a building, of such extent and character as may be suitable and adequate for the reasonable and comfortable use and accommodation of its members and their guests and provided with suitable and adequate kitchen and dining room space and equipment and maintaining a sufficient number of servants and employees for cooking, preparing and serving food and meals for its members and their guests; provided, that such club files with the local liquor control commissioner at the time of its application for a license under this Act two copies of a list of names and residence of its members, and similarly files within ten (10) days of the election of any additional member his name and address; and, provided further, that its affairs and management are conducted by a board of directors, executive committee, or similar body chosen by the members at their annual meeting and that no member or any officer, agent, or employee of the club is paid, or directly or indirectly receives, in the form of salary or other compensation, any profits from the distribution or sale of alcoholic liquor to the club or the members of the club or its guests introduced by members beyond the amount of such salary as may be fixed and voted at any annual meeting by the members or by its board of directors or other governing body out of the general revenue of the club * * *".* (Emphasis ours.)

Paragraph 125 of Chapter 38 of the Illinois Revised Statutes provides, in part, as follows:

*"All persons within the jurisdiction of said State of Illinois shall be entitled to the full and equal enjoyment of the accommodation, advantages, facilities and privileges of inns, restaurants, eating houses, hotels, soda fountains, soft drink parlors, taverns * * * and all other places of public accommodations and amusement, subject only to the conditions and limitations established by laws and applicable alike to all citizens * * *".* (Emphasis ours.)

Paragraph 131 of Chapter 38 of the Illinois Revised Statutes provides as follows:

"PLACE OF PUBLIC ACCOMMODATION DEFINED.

*A place of public accommodation, resort or amusement within the meaning of this Act shall be deemed to include any inn, tavern, hotel, whether conducted for the entertainment, housing, lodging of transient guests, or for the benefit, use or accommodation of those seeking health, recreation or rest, any restaurant, eating house, public conveyance on land or water, bath house, barber shop, theater and music hall * * *".* (Emphasis ours.)

Section 12B of Article VI of the Illinois Liquor Control Act (Par. 133, Chap. 43, Ill. Rev. Stat.), provides as follows:

"CIVIL RIGHTS IN LICENSED PREMISES. § 12b.

No licensee licensed under the provisions of this Act shall deny or permit his agents and employees to deny any person the full and equal

enjoyment of the accommodations, advantages, facilities and privileges of any premises in which alcoholic liquors are authorized to be sold subject only to the conditions and limitations established by law and applicable alike to all citizens."

Section 13 of Article VI of the Illinois Liquor Control Act (Par. 134, Chap. 43, Ill. Rev. Stat.), provides as follows:

"SALES ON CREDIT. § 13.

No person shall sell or furnish alcoholic liquor at retail to any person on credit or on a pass book, or order on a store, or in exchange for any goods, wares or merchandise, or in payment for any services rendered; and if any person shall extend credit for such purpose the debt thereby attempted to be created shall not be recoverable at law; *provided that nothing herein contained shall be construed to prevent any club from permitting checks or statements for alcoholic liquor to be signed by members or bona fide guests of members and charged to the account of such members or guests in accordance with the by-laws of said club*; and provided further, that nothing herein contained shall be construed to prevent any hotel from permitting checks or statements for liquor to be signed by regular guests residing at said hotel and charged to the accounts of said guests". (Emphasis ours.)

Section 12 of Article IX of the Illinois Liquor Control Act (Par. 177, Chap. 43, Ill. Rev. Stat.), provides, in part, as follows:

"DEVICES TO EVADE PROHIBITED. § 12.

The giving away or delivery of any alcoholic liquor for the purpose of evading any provision of this Article * * * *or other shift or device to evade any provision of this Act, shall be held to be unlawful selling*". (Emphasis ours.)

What emerges from a rational reading of the cited statutory provisions may be stated as follows:

(1) None but a regularly organized club, chartered not for profit, solely for the promotion of some common object, other than the sale of alcoholic liquors, meeting all the requirements of Section 2.24 of Article I, is qualified to receive a license as a club, authorizing it to dispense alcoholic liquors solely to its bona fide members and bona fide guests of members.

(2) That all other licensed retail liquor dispensing establishments are places of public accommodation, whose facilities must be made available on equal terms and conditions to all persons, without distinction.

(3) That with the exception of hotels and regularly organized clubs meeting all requirements of Section 2.24 of Article I, retail liquor licensees are prohibited from dispensing any alcoholic liquor other than on a cash basis.

(4) That shifts or devices to evade any provisions of the State Liquor Act will not be sanctioned.

These views and conclusions find support in the holdings of our courts of review construing these provisions.

City of Chicago v. Corney, 13 Ill. App. 2d, 396 (1957), has special application to the matter now being considered. There, the Appellate Court, construing Paragraph 125, Chapter 38, above cited, stated (pages 402, 403):

"The purpose of the statute, as stated in *Picket v. Kuchan*, 323 Ill. 138, 'is to regulate, for the promotion of the public good, certain businesses in which the public have an interest * * *'. As applied to taverns and restaurants * * * the statute imposes obligations and duties and gives to persons wishing to patronize such places rights unknown to the common law * * *. Under the statute, the accommodations, ad-

vantages, facilities and privileges of taverns and restaurants, like those of inns and common carriers of passenger or freight under the common law, must be made available on equal terms and conditions to all persons * * *. Persons seeking such accommodations, etc., cannot be excluded from the premises so long as they conduct themselves in a peaceable and orderly manner * * *".

"The defendants here, so long as they conducted themselves in an orderly manner, had a right superior to the rights of the owners and employees of the tavern and restaurant business, to enter the premises and wait for service, so long as the place was open and occupied by others enjoying the accommodations of the business being conducted there * * *".

Vach v. Benjamin, 348 Ill. App. (1952), page 131, involving the credit provisions (Sec. 13, Art. VI, Illinois Liquor Act), held that a bartender of a cocktail lounge could not recover the amount of a so-called loan advanced to a patron for purchasing alcoholic drinks, since the transaction was a mere subterfuge to evade the provisions of the Illinois Liquor Control Act prohibiting the extension of credit for the purchase of liquor. The court, after citing the provisions of the statute referring to credit, stated on pages 133-134:

"The legislature recognized that there might be attempts to evade the law and provided, (Ill. Rev. Stat., 1951, Ch. 43, Par. 177), that any * * * shift or device to evade any provision of this Act shall be held to be an unlawful selling * * *".

"The Liquor Control Act is a salutary law designed to protect the public from the evils that brought about prohibition.

"The sections of the statute cited protect the individual, 'after he has had that one drink too many,' from running up a big bill for drinks on credit and then as an aftermath not only he, but his family, suffers the consequences of his indiscretions. *The loan to defendant by plaintiff was a mere subterfuge to evade the provisions of the statute prohibiting the extension of credit for the purchase of liquor* and clearly is in violation of the provisions heretofore cited * * *". (Emphasis ours.)

From our review and analysis of the foregoing statutory enactments and cited authorities, it is our opinion that the International Playboy Club and the Gaslite Club, licensed as restaurants and retailers of alcoholic liquor, lacking requisite statutory qualifications, are not bona fide private clubs, but are places of public accommodation, both under the provisions of the Illinois Liquor Control Act and paragraphs 125 and 131 of Chapter 38 of the Illinois Revised Statutes. As licensed places of public accommodation, their facilities must be made available to the general public.

We now turn to the specific questions propounded in the transmitted communication, answering them in the order listed:

(a) So-called key clubs and similar organizations, whether incorporated for profit or individually operated, are not qualified private clubs within the statutory definition and may not prevent "non-members" from entering their premises and purchasing food or liquor.

(b) So-called key clubs, which are not qualified private clubs, may not discriminate between so-called members and non-members by requiring the latter to pay a cover charge, while exempting "members" from paying similar charges.

(c) So-called key clubs, which are not qualified private clubs, are prohibited from extending credit to so-called members for any alcoholic drinks, but all patrons alike must pay cash for all alcoholic drinks served and sold.

(d) The maintaining of a locked door during operating hours by the so-called key club, with an arrangement for a bell or buzzer to gain admission from the outside, is clearly a device or shift to circumvent the provisions of the Illinois Liquor Control Act. Furthermore, a locked door during operating hours is inconsistent with the duty imposed upon liquor authorities and law enforcement officers "to enter at any time upon any premises licensed * * * to determine whether any provisions of the Act are being violated" (Sec. 3, Art. IV, Ill. Liquor Control Act). Enforcement of the City's closing hours ordinance, Chapter 147-13 of the Municipal Code of Chicago, would be rendered impossible.

(e) So-called key clubs, or similar organizations, organized for profit, may not restrict prospective patrons from entering by the use of a key, card or other like method. These devices are all shifts, calculated to defeat the expressed policy of the Liquor Act and must be considered illegal subterfuges.

(f) Whether a club is a bona fide private club, within the meaning of the term "club" as defined by the Liquor Act, will be developed when it files for a liquor license and its application will be investigated by your department. Initially, your department should examine the charter issued by the Secretary of State to determine whether it is a not for profit corporation; thereafter, inspection of its books and records, as well as its premises, will establish whether its operations are in fact not for profit.

(g) Any attempt by the so-called club actually operating for profit to avoid service to the general public, by claiming tables are reserved when tables are obviously available, would be regarded as a shift or device to circumvent the provisions of the Illinois Liquor Control Act.

In conclusion, it is our opinion that an organization purporting to be a club, is not actually one, nor is it entitled to the privileges granted clubs, unless it conforms to all the requirements of the definition of a club, found in Section 2.24 of Article I of the State Liquor Act, even though it may have been organized as a corporation, not for pecuniary profit, under the laws of this State.

B. STATE, VEHICLE AND DRIVER'S LICENSES

VEHICLE TAG FOR MOBILE CRANE

(No. 11816—City Collector—M. I. W.—May 14, 1954.)

In your letter of March 11, 1954, you attach a communication from the president of the Mobile Crane Owners' Association in which he states that members of the Association operate cranes which are mounted on a chassis that moves on a crawler type track, and some others which are mounted on rubber tired wheels. The letter calls attention to the fact that the Illinois legislature in 1953 enacted Senate Bill 342 under which section 9 of the Illinois Motor Vehicle Law (Chap. 95½, par. 9, Ill. Rev. Stat. 1953) was amended to read as follows:

"* * * The owner of any motor vehicle of the second division having a corn sheller, a well driller, hay press, clover huller or farm machinery permanently mounted thereon and used solely for transporting the same and the owner of any motor vehicle of the second division, which is used exclusively by such owner and is not for hire,

*having special purpose machinery or equipment permanently mounted thereon and used solely for transporting the same, shall pay the license fee of five dollars (\$5.00), provided in the first paragraph of this section and shall be exempt from the flat weight tax provided in this Act; * * **

Your correspondent states that under this act the Secretary of State has been issuing "AG" (agricultural) class licenses to owners of mobile cranes, and points out that the application form for Chicago vehicle licenses states that the prefix letter of the state license issued for the vehicle be indicated on the form and that the vehicle license classification must agree with the state license. It is then argued that since the city form contains no "AG" classification, and since the Secretary of State "does not consider our equipment in the category of trucks as our equipment is used almost entirely in off the road work" that said vehicles should not be considered as trucks and the operators should, therefore, not be required to purchase vehicle licenses.

You state that it has been your practice to insist that applications for city licenses for trucks, tractor-semi-trailer units and buses show the prefix letter and number of state license issued for the vehicle as a means of control and convenience since at the time of the adoption of the ordinance, the city council adopted a schedule of fees based on weight in exact agreement with what was required by the state.

You request our opinion as to whether mobile cranes, and other vehicles with permanently mounted machinery or equipment, are or are not subject to the Chicago vehicle license tax if operated within the city in view of the new classification of such vehicles by the state as "AG" (Agricultural Class).

The classification of trucks, semi-trailers, tractor-semi-trailers and motor buses as to weight for the purpose of scheduling fees for vehicle tax licenses is found in section 29-5 of the Municipal Code of Chicago. While it is true that the weight classifications contained therein are identical to that which was scheduled by state statute at the time the ordinance was adopted, such identical scheduling was in no wise mandatory upon the city.

Limitations of the power of municipalities to collect a tax for the use of motor vehicles are spelled out in section 26A of the Motor Vehicle Law, Par. 32a, Chap. 95½, Ill. Rev. Stat. (1953). No requirement is found therein limiting the city to the classification adopted by the state in its licensing program. The city being free to ignore the state's classification at the time it adopted its own, it follows that any subsequent modification of its schedule by the state has no effect whatsoever upon the city's power. The city remains free to impose a reasonable tax upon the class of vehicles here involved.

The question then is whether the city's ordinance presently embraces such vehicles.

Section 29-1 of the Municipal Code of Chicago defines a motor vehicle as "any vehicle propelled otherwise than by the muscular power of man or animal except such as run on rails or tracks". This definition includes vehicles of the type described in your letter.

Section 29-2 makes it unlawful for any person to use any motor vehicle upon the public ways without obtaining a license.

Section 29-5 establishes the amount of tax for each class of vehicles. The basis for charge is a flat weight classification. A system of letters for easy designation of each class is found therein. The letters so selected are similar to the letters used in the statute referred to above. Here too, the use of such letters was not mandatory upon the city in any way, but was chosen for the obvious convenience of easy cross-checking making for more efficient enforcement. The intention of the city council to establish a flat

weight basis for computation is further evidenced by the provision in section 29-5 that

"The owner of each vehicle who has elected to pay a mileage weight tax to the State of Illinois shall be required to be licensed as in this ordinance provided."

By the terms of this section the city itself expressly declares its independence from the state system of licensing.

The ordinance provides no exemption for vehicles of this type from its general provisions, nor has any special class been created affording such vehicles treatment distinctive from the weight basis applied generally.

Reference is made to the application form used by your office upon which appears the words, "Must agree with state license". It is urged that since there is no AG classification on the city's form, no license is required. The language referred to on the form is not required by the ordinance but was adopted by the City Collector under the authority granted in section 29-3 to prescribe "further information" to appear on the application beyond that required under the terms of the ordinance itself. Such language was appropriately chosen as a means of providing an effective check. While it is true that as to the AG class there is now no corresponding classification on the form and some question may arise from applicants as to how to fill out the form, this can in no way affect the licensing requirement itself. The basis for licensing is weight, and filling in all the other information required (which includes weight) is sufficient to provide you with a guide as to the amount to be charged.

It is, therefore, our opinion that you are correct in your interpretation in that mobile cranes of the type described are required to be licensed on a weight basis as are other trucks, tractors and semi-trailers, and that the change in state law is without any effect in this matter.

VEHICLE LICENSE EXEMPTION FOR MILITARY PERSONNEL

(No. 11821—P. P.—M. I. W.—May 19, 1954.)

Mayor Kennelly has forwarded to us your letter of May 12th, in which you state that certain non-resident military personnel, have received warnings from members of the Chicago Police Department concerning the purchase of city vehicle tax licenses for their automobiles.

You further state that some military personnel at your base have living quarters in Chicago, but that this is a direct result of being stationed at O'Hare International Airport by military orders.

You cite authorities (considered below) in support of your opinion that military personnel not permanent residents of the city are exempt from payment of the city vehicle tax.

The case of *Woodroffe v. Village of Park Forest*, 107 Fed. Supp. 906 (1953) involved this precise question. The United States District Court for the Northern District of Illinois held that a member of the armed forces who was assigned to Fifth Army Headquarters in Chicago was exempt from the provisions of a motor vehicle licensing ordinance of the Village of Park Forest, a suburb of Chicago, which imposed a tax upon every owner of a motor vehicle who "resides" within the village.

The court based its decision on the provisions of the Soldiers' and Sailors' Relief Act. 50 U. S. C. A. appendix sec. 501 et seq., Section 17 of which reads in part as follows:

"(1) For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any State * * * or political subdivision (thereof) * * * such person shall not be deemed to have lost a residence or domicile in any State * * * or political subdivision (thereof) * * * solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become a resident in or a resident of, any other State * * * or political subdivision (thereof) * * * while and solely by reason of being so absent. For the purpose of taxation in respect of the personal property, income, or gross income of any such person by any State * * * or political subdivision (thereof) * * * of which such person is not a resident or in which he is not domiciled * * *, personal property shall not be deemed to be located or present in or to have a situs for taxation in such State * * * or political subdivision (thereof). When used in this section * * * (b) the term 'taxation' shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof; *Provided*, that the license, fee, or excise required by the State * * * of which the person is a resident or in which he is domiciled has been paid."

The constitutionality of this act was affirmed in *Dameron v. Broadhead*, 345 U. S. 322, 73 Sup. Ct. 721 (1953).

We are, therefore, in agreement with you in that military personnel are exempt from the payment of the city vehicle tax if they are present in Chicago, solely by virtue of military orders, and are in law residents of places outside Chicago, to which we add the proviso found in the act to the effect that this exemption applies only when the license fee imposed by the state in which such personnel reside has been paid.

We have discussed this matter with the Chief of the Traffic Division of the Chicago Police Department to whom we are forwarding a copy of this letter. He assures his complete co-operation. Since summons for violation of the vehicle tax ordinance are as a matter of practice issued by personal service by the police officer rather than by the "hang on" method used in other violations, your men should have no difficulty if they present the appropriate credentials to the police officer.

Thank you for bringing this matter to our attention. Please feel free to notify this office or the Chief of the Traffic Division of any further difficulty you may encounter.

APPLICABILITY OF VEHICLE LICENSE ORDINANCE

(No. 11848—City Collector—A. F. G.—September 13, 1954.)

In your letter of July 26, 1954 you say :

"From time to time this office has put to it questions relating to our Chicago Vehicle License Ordinance and its application in various circumstances, some of which are obvious and easily answered, but there are others that we hesitate to answer definitely, such as follows :

1. Does an out-of-state trucking firm, with headquarters in another city, have the right to send trucks to Chicago to make deliveries daily or weekly? Or to pick up merchandise? Or both deliver and pick up? In such cases would the trucks need Illinois State License, Chicago

Vehicle License, or Safety Inspection Sticker? Would the fact that they made more than one delivery or pick-up of merchandise, etc. have any bearing as to their license liability?

2. A large trucking corporation, whose headquarters are located outside Chicago, but whose trucks pick-up and deliver within Chicago, questions our right to compel procurement of Chicago Vehicle Licenses for their vehicles so used. Do we have this right?
3. Are trucks bearing out-of-State licenses liable to Chicago Vehicle License if they make multiple pick-ups within Chicago if the goods, etc. so picked up are consigned as Interstate Commerce? Where deliveries are made in Chicago direct to the consignee from Interstate equipment, can we hold the vehicles subject to Chicago Vehicle License?
4. Are trucks, being used to shuttle material within the City of Chicago from a loading dock in Chicago, subject to Chicago Vehicle License if such trucks display out-of-State licenses?
5. May we hold subject to Illinois and/or Chicago Vehicle Licenses interstate trucks that are registered and licensed in an adjoining state but which carry on the bulk of their operation in Chicago?
6. An interstate trucking firm, whose Home Office is in Chicago and under which their vehicles are registered, questions their liability for Chicago Vehicle Licenses. We think they are liable. Who is right?
7. (Example) The Kool Vent Awning Corporation has their Main Office and Show Rooms at 2100 N. California Ave. They also have a Sales and Show Room at 10615 S. Halsted Street, this city, as well as another Sales and Show Room in Oak Park, Ill. They advertise and are listed in the Chicago Telephone Directory, listing their general office at 2100 North California Avenue, this city. However, they have a factory located at 7818 W. Grand Avenue, Elmwood Park, Ill. and under such address have registered all their vehicles, consisting of ten (10) motor trucks and three (3) automobiles, for all of which they have procured Elmwood Park Vehicle Licenses. May we hold subject to Chicago Vehicle License any of this corporation's vehicles operated within Chicago in connection with the sale or erection of their awnings, etc? Were they not a Corporation, would such fact make any difference as to their license-liability under such circumstances?

May I ask you to kindly render me an Opinion covering these particular points on which our interpretation of the ordinance has been questioned."

In an opinion to the city clerk dated October 14, 1942, published in full in Vol. XXI of the Opinions of the Corporation Counsel at page 152 re power of the City to compel motor vehicles to obtain City vehicle tags in certain enumerated cases, we said:

"As a general rule for your guidance, please be advised that under the state law (Section 26a, Motor Vehicle Act, Ill. Rev. Stats. 1941, chap. 95½, par. 32a) the city may exact a motor vehicle license only from persons residing within the city. The first paragraph of section 29-2 of the Municipal Code of Chicago introduces the additional element of use of the motor vehicle upon the public ways of the city. Giving effect to both the statute and the ordinance, these two elements must be present in order to permit the city to exact a motor vehicle license, namely, (1) the owner must be a resident of the city, and (2) the motor vehicle must be used upon the public ways of the city.

The second paragraph of section 29-2 requires persons not residing within the city and using motor trucks, motor driven commercial vehicles or motor driven vehicles which are used for public hire upon the public

ways of the city to take out a city motor vehicle license unless the owner shall have obtained a certificate of registration from the secretary of the state of Illinois. In our opinion this provision of the ordinance is beyond the power of the city council to enact since it attempts to exact motor vehicle license from a nonresident owner."

With the foregoing general rules in mind, we answer your specific questions in numerical order.

1. An out-of-state trucking firm, not being a resident of Chicago, may make truck deliveries and pick-ups in Chicago and do not require Illinois or Chicago licenses or safety inspection stickers. The number of deliveries made has no bearing on the matter.
2. You have no right to compel such a corporation to procure Chicago vehicle licenses.
3. Out-of-state trucks are not subject to Chicago vehicle licenses regardless of the character of business they carry on on Chicago streets.
4. Trucks bearing out-of-state licenses are not subject to Chicago wheel tax.
5. No.
6. In answer to a similar question, we held in an opinion dated June 11, 1942, "If the owner of a vehicle registers such vehicle with the Secretary of State of Illinois for the purpose of obtaining a state license and gives a Chicago address, it must be presumed that the owner is a resident of the city of Chicago, and therefore is required to obtain a City of Chicago vehicle license. It is our opinion that you should attempt to collect a license fee in such cases."
7. In answer to this question we quote from an opinion of October 14, 1942 (Opinions C.C. Vol. XXI p. 152) referred to above in which we answered a somewhat similar question as follows:

"You further state that you are running into difficulty as many large trucking concerns insist that if you enforce the ordinance in conformity with our opinion of June 11, 1942, that next year they will get a state license from another address outside of the city of Chicago, for example, one of their terminals. In our opinion of June 11, 1942 we stated that if the owner of a vehicle registers such vehicle with the secretary of state for the purpose of obtaining a state license and gives a Chicago address, it must be presumed that the owner is a resident of the city of Chicago. This presumption, however, is not conclusive. If the corporation can show convincingly that the home office and principal place of business is not in Chicago, then in our opinion they are not residents of the city and are not required to take out a city license. Conversely, if the home office and principal place of business is in Chicago, then the corporation is a resident of the city of Chicago and must take out a city license. The giving of a Chicago address when registering with the state is simply a fact upon which the city officials may make an initial presumption of residence within the city. The address stated in the application for registration is not controlling."

We suggest that you read this opinion as several questions concerning the power of the City to require vehicles to have wheel tax licenses, not requested in your letter, are fully discussed.

DEALER'S LICENSE PLATES

(No. 11936—Commissioner of Police—A. F. G.—August 16, 1955.)

In your letter of August 11, 1955, which was accompanied by a letter from the Chief of Traffic, in which he asks that an opinion of this office be obtained as to the interpretation of Section 17 of the Illinois Motor Vehicles Law (Dealers license plates) and Section 29-13 of the Municipal Code of Chicago (Dealers vehicle license plates), you request we furnish such an opinion.

Section 17 of the Motor Vehicle Act provides that

"Every person, firm, association or corporation manufacturing or dealing in motor vehicles at an established place of business may, instead of registering each motor vehicle so manufactured or dealt in, may make a verified application upon a blank furnished by the Secretary of State for a general distinctive number for all the motor vehicles owned or controlled by such manufacturer or dealer," * * *

The section then provides for the form and contents of the application, the amount of the fee and the filing and recording of such application in the office of the Secretary of State.

"There shall thereupon be assigned and issued to such manufacturer or dealer a general distinctive number, and, without further expense to him, there shall be issued and promptly delivered to such manufacturer or dealer at his business address a certificate of registration in such form as the Secretary of State shall prescribe and two number plates with a number corresponding with the number of such certificate of registration. * * * Such number plates shall not be used on motor vehicles rented by such dealer holder thereof to any person, firm or corporation or used to transport passengers or property for hire. By filing application for the same, such manufacturer or dealer may obtain as many duplicates of such number plates as he may desire upon payment to the Secretary of State for each set of two plates the sum of \$3.00 per annum."

Section 29-13 of the Municipal Code of Chicago as amended December 9, 1954, Council Proceeding of that date, page 8756, provides for the issuance of dealers vehicle plates or stickers to dealers licensed by the State and contains the same limitation on the use of such plates as is provided in Section 17 of the State Act above discussed.

It is our opinion that the legislature in enacting Section 17 and the City Council in enacting Section 29-13 intended that the special plates issued under the statute and the ordinance should be used only for purposes incidental to the operation of the dealers business. We suggest your department cooperate with state officials to prevent misuse of the special privileges granted to dealers.

Ed. Note: See Opinion No. 11943 at page 361.

FREE VEHICLE LICENSE FOR DISABLED VETERANS

(No. 11940—Chairman, Committee on Finance—R. N.—August 23, 1955.)

You have requested the law department to review the statutes relating to the issuance of vehicle licenses to disabled war veterans and to advise your committee as to the power of the City of Chicago to issue such licenses free of charge.

Section 8a of the Illinois Motor Vehicle Law reads as follows:

"8.2 Disabled veterans—Registration of certain vehicles without fee.) Section 8a. Any disabled veteran who has been or shall be awarded an automobile by the Federal Government because of his disability may make application for registration of that vehicle or any other motor vehicle which he may own resulting from a trade or exchange for such automobile to the Secretary of State without accompanying such application with the usual fee for registration of a vehicle of a similar type. Any disabled veteran of World War I who has a service-connected disability of such a nature that it would, if it had been incurred in World War II, entitle him to be awarded an automobile by the federal government may make application to the Secretary of State for registration of one motor vehicle of the first division owned by him without accompanying such application with the usual fee for registration of a vehicle of similar type.

The Secretary of State shall issue license plates upon the receipt of such application made under oath and in such form as he may require." (I. R. S. 1955, Ch. 95½, Par. 8-2.)

In this connection it should be noted that the federal government also grants such exemption.

While former opinions of this department have held a similar exemption to the issuance of peddlers' permits without charge to war veterans to be unconstitutional, said opinions were written prior to World War II and prior to the enactment of the state law above quoted (1953). The city council has before it other precedents for action exempting the exercise of certain privileges from payment of the prescribed fees therefor; i.e., the exemption of hospitals under certain conditions from payment of license fees, and the exemption of institutions maintained for religious or charitable purposes from payment of certain permit fees.

According to the letter from the president of the Amputee Veterans Association which accompanied your request, approximately 1666 veterans will be eligible for the exemption requested. This department has prepared and transmits herewith draft of an ordinance designed to accomplish the stated purpose. However, the granting of such exemption constitutes a matter of policy to be decided by the city council.

FEDERAL EMPLOYEES WHEEL TAX EXEMPTION

(No. 11941—Commissioner of Police—A. F. G.—August 23, 1955.)

Your letter of August 20, 1955 reads as follows:

"Attached hereto is a copy of a report submitted by the Chief of our Traffic Division in reply to a complaint made about employees of the U. S. Public Health Service Hospital, 4141 Clarendon Avenue, being issued summons for 'no vehicle tag'.

As a report, it requests your opinion on a letter furnished by the then City Clerk, Peter Brady, to the hospital in 1936.

Will you kindly favor me with a legal opinion on this subject of residency."

The letter of City Clerk Peter J. Brady referred to above, states that he has received an opinion from the corporation counsel with respect to the immunity of certain federal employees from the payment of wheel tax licenses. The opinion referred to, dated January 10, 1936, reads as follows:

"We have received your communication of December 31, 1935 transmitting letter from the United States Public Health Service, Treasury

Department, in which Doctor M. J. White, medical director of the United States Marine Hospital at Chicago, Illinois, claims exemption from the payment of wheel tax licenses for those federal employees who live at the hospital and garage their cars on the hospital property.

We understand through communicating with the Marine Hospital authorities that the federal employees to be exempted are employees of the Treasury Department of the United States Government and are subject to transfer on twenty-four hours' notice.

In conformity with opinions rendered by this office on March 10, 1922 and May 4, 1932 respectively please be advised that in our opinion the federal employees who live and garage their cars at the Marine Hospital come within the same classification as army or navy officers stationed on military reservations in that they do not 'reside within the city of Chicago' and are therefore not subject to the payment of wheel tax licenses.

However, even though these federal employees are exempt from the payment of this fee you are not authorized to issue free wheel tax plates or stickers to them as the ordinance provides for the issuance of such plates or stickers only to government-owned or government-operated vehicles."

We concur in the conclusion reached in the said opinion, and are of the opinion that it is a correct statement of the law on the subject. We must disagree with those police officers who disregard it, as "outdated".

DEALERS LICENSE

(No. 11943—Commissioner of Police—A. F. G.—August 25, 1955.)

On August 16, 1955, we advised you with reference to use of dealers' license plates. We concluded our opinion with the following statement:

"It is our opinion that the legislators in enacting Section 17 and the City Council in enacting Section 29-13 intended that the special plates issued under the statute and the ordinance should be used only for purposes incidental to the operation of the dealers business. We suggest your department cooperate with state officials to prevent misuse of the special privileges granted to dealers."

Since this opinion was written our attention has been called to an opinion of the Attorney General of Illinois dated February 3, 1954, on the same subject matter (Section 17 of the Motor Vehicle Act, Par. 18, Chapter 95½ Ill. Rev. Stats. 1953). The opinion is as follows:

"I have your letter of recent date inquiring whether a person handling a load of lime for his own use in a truck-displaying dealer's license plates has violated any section of the Motor Vehicle Act.

Section 17 of the Motor Vehicle Act, (Par. 18, Ch. 95½, Ill. Rev. Stats. 1953) provides for the issuance of dealer's license plates when certain prescribed conditions are met. Said section further provides as to the use of said plates by establishing the following requirements:

- (a) The person, firm, association or corporation must manufacture or deal in motor vehicles at an established place of business.
- (b) The particular motor vehicle must be owned or controlled by such manufacturer or dealer.
- (c) The plates must not be used on motor vehicles rented to any person, firm or corporation.

- (d) The motor vehicles displaying such plates must not be used to transport passengers or property for hire.

Assuming that the requirements set forth above have been met in the instant case, I am of the opinion that the use of dealer's license plates does not appear to be prohibited merely because the motor vehicle is hauling lime for the dealer's own use."

When the Motor Vehicle Act was first enacted in 1919, there was no limitation provided in Section 17 of the Act on the use of dealer's license plates. By an amendment adopted in 1923, Laws of 1923, p. 546, the use of dealer's plates was limited in the following language:

"Such license plates shall be used only by such dealer on cars operated by him for sales and demonstrating purposes only."

By an amendment adopted in 1939, Laws of 1939, p. 751, the provision quoted above which permitted dealer's plates to be used only for sales and demonstrating purposes, was superseded by the provision now found in the section which prohibits their use "on motor vehicles rented to any person, firm or corporation, and on motor vehicles used to transport passengers or property for hire."

A study of the history of this section indicates the legislative intent to broaden the use to which dealer's plates may be put. In striking out the amendment of 1923, which limited their use to sales and demonstration purposes, and substituting therefor the provision of 1939, which prohibits their use for two specific purposes, it would appear that the legislature intended that the plates might be used for any purpose other than those provided by the amendment of 1939.

That is the opinion reached by the Attorney General and we are inclined to agree with his construction.

We are, therefore, inclined to modify the conclusion reached in our opinion of August 16, in conformity with the views here expressed.

VEHICLE TAG FOR CONSTRUCTION EQUIPMENT

(No. 12077—City Clerk—A. F. G.—September 20, 1956.)

In your letter of September 16, 1956 you say:

"I have had numerous phone calls from contracting and excavating firms in regard to licensing of their permanently mounted equipment such as Post Hole Augers, Trenching Machines and Back Fillers, etc. These vehicles do not carry any freight or passengers. On several occasions the police have issued arrest notices to the owners of these types of equipment for not having vehicle licenses.

The State of Illinois provides for the licensing of the above vehicles but to my knowledge the City Code makes no provision.

Kindly issue an opinion as to whether or not this type of equipment requires a vehicle license."

Section 29-1 of the Municipal Code of Chicago, defines a motor vehicle as follows:

"For the purpose of this chapter a motor vehicle is hereby defined as any vehicle propelled otherwise than by muscular power of man or animal, except such as run on rails or tracks."

Section 29-2 of the said code provides in part as follows:

"It shall be unlawful for any person residing within the city to use, or to cause or permit any of his agents or employees to use, any motor vehicle upon the public ways of the city, unless such vehicle be licensed as hereinafter provided."

Section 29-15 of the said code provides for exemptions of certain motor vehicles from the provisions of the chapter requiring the payment of a vehicle tax. Motor vehicles of the kind referred to in your letter are not included in the exemptions.

From the foregoing reference to sections of chapter 29 we are of the opinion that motor vehicles of the type described in your letter are subject to the provisions of the Wheel Tax Ordinance and should display vehicle stickers.

Section 9 of the Motor Vehicle Law requires motor vehicles of the type described in your letter to be licensed by the State, in the following language:

"* * * the owner of any motor vehicle of the second division which is used exclusively by such owner and is not for hire, having special purpose machinery or equipment permanently mounted thereon and used solely for transporting the same, shall pay the license fee of \$5.00 provided in the first paragraph of this section and shall be exempt from the flat weight tax provided in this Act; * * *."

CHAUFFEUR'S LICENSE

(No. 12083—Chief Justice—A. F. G.—October 30, 1956.)

With your letter of October 24, 1956 you attached a letter from Mr. R. E. Fitzgerald, Assistant Business Manager, International Brotherhood Electrical Workers. You have written Mr. Fitzgerald that you believe it advisable for everybody's protection to obtain an opinion on this matter before you replied to this letter. You ask our opinion. Mr. Fitzgerald's letter is as follows:

"As Assistant Business Manager of Local Union 9, International Brotherhood of Electrical Workers, I am concerned about our members who are driving trucks carrying equipment in the City of Chicago and Cook County. We are given to believe it is not necessary for them to have other than a driver's license.

I called the Police Department of the State of Illinois and the Secretary of State's office and was told they did not need a chauffeur's license when operating trucks hauling only men, tools and materials, used in the performance of our work. There are other equipment trucks with booms and winch lines or hole digging augers, trenching machines and trailers for hauling the poles or reels of cable.

I believe their decision was derived from Section 4 (b) Illinois Drivers License Act, to wit:

'Section 4 (b) Illinois Drivers License Act'

'Chauffeur means every person whose principal occupation is that of operating a motor vehicle as a mechanic or employee, or who directly or indirectly receives pay or any compensation whatsoever for any work or services in connection with the operation

of a motor vehicle for the transportation of passengers or property for hire, or who drives a school bus when transporting persons; provided, however, *no person shall be held to be a chauffeur who operates a motor vehicle, including road machines, farm tractors and implements of husbandry, incidentally to some other and principal occupation and where such motor vehicle is so operated solely and in furtherance of such other and principal occupation* and is not used for the transportation of passengers or property for hire; and provided further that no person shall be held to be a chauffeur within the meaning of this Act when operating a farm tractor in use only for agricultural pursuits, including the transportation of agricultural and horticultural products.'

This does involve many men, for example, we had over four hundred (400) electricians and helpers working for our contractors during 1956. We are told the Power Companies are planning a larger program for 1957.

A clarification of the law will be appreciated."

On January 11, 1952 we sent an opinion to the Superintendent of the House of Correction in answer to the following query:

"We have five trucks going around the city on various missions and a truck and a station wagon at the farm that runs back and forth to the House of Correction.

The past practice here has been to have the regular officers as drivers of those trucks. I would like to have an opinion from you as to the responsibility of the City of Chicago or my personal responsibility if any one of those trucks should become involved in an accident. Should those trucks be insured and should the drivers have chauffeur's licenses?"

In our reply which is published in full in Vol. 23 of the Opinions of the Corporation Counsel at page 106 we said:

"When you say that 'regular officers' drive trucks on errands for the institution, we assume you mean regular employees such as guards, laborers, etc. Section 27 of the 'Motor Vehicle Law,' Paragraph 33, Chapter 95½, Ill. Rev. stats. 1951 which provides for the licensing of chauffeurs has the following proviso:

'Provided, however, that no person shall be held to be a chauffeur, and subject to the provisions thereof, who operates a motor vehicle incidentally to some other and principal occupation and where such motor vehicle is not used for the transportation of passengers or merchandise for hire.'

It is our opinion, therefore, that the employees referred to whose principal occupation is not driving trucks, but who do so occasionally, are not required to be licensed as chauffeurs. * * *

There is no difference in principle in this use and that suggested in the Fitzgerald letter and our opinion is that the electricians who operate trucks occasionally incidental to their principal duties as electricians are not required to have chauffeur's licenses.

This construction of the statute is in harmony with that of the State Police and the Secretary of State, officers charged with the enforcement of the Motor Vehicle Law and we know of no case in which a court of record has overruled their construction of the statute.

FIRE APPARATUS

(No. 12105—Fire Commissioner—A. F. G.—February 1, 1957.)

On January 28, 1957, Commissioner Mullaney referred to this office a letter he had received from a citizen, inquiring why most of the fire department motor vehicles do not bear State license plates. A copy of this letter is enclosed.

Every motor vehicle owned by the City of Chicago including fire apparatus is required by the Motor Vehicle Law to be registered with the Secretary of State. We so advised Former Commissioner Corrigan in an opinion dated November 18, 1952 and published in full in Opinions of the Corporation Counsel, Vol. 23, page 453. We enclose a copy of the said opinion.

We do not know why but we have been advised that no license plates have been secured for fire apparatus, only vehicles of the first division (passenger) having been licensed.

We reiterate the advice given in our opinion, and suggest that you see to it that every motor vehicle in your department is licensed as required by law. Everyone is expected to observe the laws of the State, and it would seem appropriate that public officials should set a good example for the average citizen by a strict observance of the laws affecting their offices.

VEHICLE LICENSE EXEMPTION

(No. 12194—City Clerk—A. F. G.—December 18, 1957.)

In your letter of December 11, 1957 you call attention to an amendment to section 29-15 of the Municipal Code of Chicago adopted June 27, 1957. The section provides for certain exemptions from the requirements for vehicle licenses. The amendment in question includes among the exemptions buses owned and operated by churches.

You state the Moody Bible Institute, which admittedly is not a church, has inquired if it is exempt from the necessity of paying for city vehicle stickers for the four buses which it operates. You also state you anticipate similar inquiries from parochial high schools and other religious institutions which are not churches. You ask that we advise you as to the course of action you should pursue with reference to such requests.

The amendment to section 29-15 added to the vehicles exempt from the payment of vehicle license fees buses owned and operated by churches. The language used is clear. If it had been the intention of the city council to exempt vehicles owned and operated by religious institutions or parochial high schools it would have been a simple matter to include such institutions. While all churches are religious institutions, all religious institutions are not churches. The state statutes provide rules for the construction of statutes, but the courts of this state have held repeatedly that in the construction of statutes in which the legislative intention is expressed in plain, clear and unambiguous language, there is no room for construction and effect must be given to the statutes according to the meaning of the words used.

It is our opinion, therefore, that because the language of the amendment is clear and unambiguous it applies only to churches and does not include the other institutions referred to in your letter.

VEHICLE TAX EXEMPTION—BOARD OF EDUCATION

(No. 12304—City Clerk—A. F. G.—November 17, 1959.)

Your letter of November 9, 1959 reads as follows:

"I enclose herewith a copy of a letter received from the Board of Education pertaining to vehicle licenses.

This is but one of many governmental agencies which may make a similar request.

Would you please advise me if I am authorized to issue licenses without charge to such agencies."

In its letter the Board of Education claims exemption from the payment of license fees for vehicles owned by the board by reason of section 29-15 of the Municipal Code of Chicago. That section is as follows:

"All vehicles owned and operated upon the public ways of the city by the United States government or any agency thereof, or by the state of Illinois or any department thereof, or by any political subdivision, public or municipal corporation of the state of Illinois or any department or other agency of such corporation, or by the American Red Cross, all buses owned and operated by churches in conjunction with the authorized activities of said institutions, and all vehicles exempt from payment of a registration fee under section 8a of Motor Vehicle Law of the state of Illinois, shall be exempt from the vehicle tax. Every exempt vehicle shall have the name of the owner painted in letters at least one and one-half inches in length in a conspicuous place on the outside of each side of the vehicle; provided that in lieu of such identification every vehicle which is exempt from payment of the state motor vehicle registration fee, shall have a license plate or emblem as provided in sections 29-6 and 29-7; and every vehicle owned by the United States government or any agency thereof, which is not identified as herein required, shall have such license plate or emblem. All license plates or emblems for vehicles exempt from payment of the vehicle tax shall be furnished by the city clerk free of charge."

Section 34-2 of Chapter 122, the School Code, reads as follows:

"34-2. *City to constitute district—Board of education.—Corporate status—Name.*) § 34-2. Each city having a population exceeding 500,000 shall constitute one school district which shall maintain a system of free schools under the charge of a board of education. The district shall be a body politic and corporate by the name of 'Board of Education of the City of * * * and by that name may sue and be sued in all courts and places where judicial proceedings are had."

This office has held in more than one opinion that the board of education is a municipal corporation separate and distinct from the City of Chicago (Opinions of the Corporation Counsel, Vol. 18, page 45, Vol. 20, p. 118). It is our opinion, therefore, that the vehicles of the board of education are exempt from the payment of fees for vehicle licenses by virtue of the provisions cited above.

DISPOSITION OF FORFEITED DRIVER'S LICENSE

(No. 12334—Supervising Judge, Traffic Division—B. M. K.—April 28, 1960.)

In your letter of April 20, 1960, you request information as to the proper disposition of driver licenses posted with the clerk of the court by motorists arrested for certain traffic violations. You state that the court has encountered a problem in the proper disposition of licenses where the defendant fails to appear on return day and the efforts to serve a warrant or capias are unsuccessful.

You also inquire about the proper action of the prosecutor with reference to these licenses after a forfeiture order is entered.

The DRIVER'S LICENSE ACT, Chapter 95½ Section 6 Illinois Revised Statutes 1959 presents a system for the proper handling of driver's license forfeitures as follows:

1. A report of the driver's license security forfeiture must be sent to the Secretary of State within three (3) days and the Secretary must be notified of the issuance of a warrant or capias Chapter 95½ Section 6-306(b)2.

2. If the warrant or capias is served, the case can be disposed of and the collateral issue of whether to vacate the forfeiture order and return the license card or whether to permit the forfeiture order to stand should be determined at that time and a formal order should be entered evidencing this decision. If a forfeiture order is vacated and the license is returned, a written report of this action must be given the Secretary of State within three (3) days, Chapter 95½ Section 6-204 Subsection 3.

3. If the capias or warrant cannot be served in a reasonable time, the license card should be forwarded to the Secretary of State with a notation that the license card security had previously been forfeited and that attempts to bring the defendant to court have been unsuccessful. A recommendation could be made at that time that the license evidenced by the card be revoked by the Secretary of State because of the failure of the motorist to appear in court and dispose the charge placed against him. This action is authorized under the provisions of Chapter 95½ Section 6-204(b) and Section 6-204a (2).

In answer to your specific questions:

1. With regard to the proper physical disposition of the license certificate in cases where the defendant has not appeared in court despite the issuance of a warrant, it is our opinion that this certificate should be forwarded to the Secretary of State with the recommendation that the license be revoked.

2. With respect to the proper action of the prosecutor—the prosecutor should see that the license card which is security for the court appearance is forfeited when the motorist fails to appear and he should see that the license card is not returned unless an order vacating the forfeiture is entered. No money can be realized upon this forfeiture so no follow-up action should be taken by the prosecutor. The certificate is forfeited and later if the defendant does not appear, the certificate should be sent to the Secretary of State with a request that the license to drive be revoked because of the failure of the motorist to appear.

If the defendant eventually appeared in court and disposed of the case he would have to obtain his driver's license card from the Secretary

of State or arrange to have a new one issued. The forfeiture order should not be vacated after the certificate is sent to the Secretary and the motorist will have to contact the Secretary in order to obtain evidence of his license to drive.

In the event that the application or license were made to the Secretary of State's Office after a license card had been forfeited, the Secretary would have the discretion of whether to insist upon disposition of the Traffic Court case before a new driver's license card was issued.

C. AMUSEMENT LICENSE AND TAX

VENDING MACHINE—"ONE ITEM"

(No. 11795—City Collector—M. I. W.—March 8, 1954.)

In your letter of February 2, you request our opinion as to "whether there can be any legal objection to the sale and distribution of a one item vending machine wherein each of the items dispensed from each machine are identical."

You attach a letter from an attorney representing the company which contemplates distribution and sale of such a coin operated machine in which he takes cognizance of an opinion of this office dated September 17, 1953 to the effect that a vending machine dispensing several different types of toys and charms was in effect a lottery and, therefore, unlawful.

He urges that since all the items dispensed by the proposed machine are similar there is no element of chance and that since no food, gum or candy will be vended, there can be no objection to operation of this machine without a license.

The opinion referred to was based on application of the test of a lottery applied by the Illinois Supreme Court in *Iris Amusement Corporation v. Kelly*, 366 Ill. 256 (1937) in which the presence of three elements were said to constitute a lottery, (1) price, (2) prize, and (3) chance. Since the customer could not control the article he would receive upon the insertion of the coin, it was held that the element of chance was present.

In the absence of chance no lottery exists and since in the case of the machine described in your letter every customer will know beforehand exactly what merchandise he will receive for his money, the element of chance is absent.

It is, therefore, our opinion that this machine is not a lottery and its operation is not illegal.

The next question presented is whether or not a license is necessary for operation of this machine.

The only provisions of the Municipal Code by which a license is required for coin operated machines are found in sections 130-32.2 to 130-32.10 relating to automatic food vending machines, and sections 104-4 to 104-8 relating to automatic amusement machines in which licenses are required for the operation of such devices.

Since this machine dispenses no food, it clearly does not fall within the provisions of sections 130-32.2 to 130-32.10.

Nor does the machine meet the definition of an amusement device found in section 104.4 of the Municipal Code in that it does not appear that the machine has any features that could characterize it as an "amusement". It is rather a straight merchandising device for dispensing goods upon deposit of a coin.

It is, therefore, our opinion that there is nothing in the ordinances of the city prohibiting the operation of this device or conditioning such operation upon the procurement of a license.

ORCHESTRAL ASSOCIATION OF CHICAGO

(No. 11897—Mayor—J. C. M.—April 18, 1955.)

We have your request concerning the application of the tax on amusements to The Orchestral Association of Chicago.

At your request we have examined the activities of the Association in relation to the tax on amusements as set forth in Chapter 104 of the Municipal Code of Chicago and the opinions rendered by our office since December 12, 1947 bearing on the interpretations of the sections therein, in order to determine whether there is any merit to the claim of the Association for exemption from said tax.

Under Section 104.1 of said code the word "amusement" is defined.

Section 104.2 is in words and figures as follows:

"104.2. A license tax is imposed upon all amusements within the city, excepting automatic machines, of an amount equal to three per cent of the gross receipts from admission fees or other charges, exclusive of federal taxes, to witness or to participate in such amusements. It is unlawful for any person to produce, present or conduct any such amusements for gain or profit, without payment of the tax (Passed. Coun. J. 11-6-47, p. 1168; amend. 12-12-47, p. 1340)."

On December 22, 1947 a copy of an opinion written on the subject by the First Assistant Corporation Counsel, dated December 12, 1947 (No. 11104) was sent to the then attorneys for The Orchestral Association of Chicago. In that opinion we said:

"There is no provision in the amusement tax ordinance (Chapter 104) exempting any person from the payment of the tax. However, the license tax is necessarily an occupation tax, since there are three forms of taxation authorized by the Illinois Constitution, viz., (1) ad valorem or property, (2) license or occupation, and (3) franchise or privilege taxes. * * * But the mere fact that the amusement is offered by or for a non-profit corporation or association or that the net receipts therefrom are used for religious, educational or eleemosynary purposes does not exempt it from the tax, if the amusement is produced, presented or conducted in regular course as a profession or in the operation of an amusement business."

We recognize that the facts lately submitted to this office by the attorney for the Association were not available to us in 1947 when the Association accepted the general ruling of our office as to the payment of amusement taxes for the public concerts produced by the Association.

From the data recently submitted to us, it appears that The Orchestral Association was organized on December 16, 1890 as a corporation not for profit, under the Illinois Statute known as "An Act Concerning Corporations" approved April 18, 1872 and in force July 1, 1872 as amended. The object

for which the corporation was formed, as stated in its certificate of incorporation, is:—"The promotion of musical art in any and every lawful way and by any and every lawful means." The Association has no capital stock and no stockholders. No member receives any compensation or distribution of income or profits of any kind. They are elected to membership because of their interest in promoting musical education and appreciation and in the presentation as a public service of great works of music by one of the outstanding symphony orchestras of the world. The affairs of the Association are managed by a board of fifteen Trustees elected by the members from among their own number at their annual meeting to serve for three-year terms.

The orchestra is made up of 102 outstanding musicians, many of whom enjoy national reputations. In its 28-weeks season extending from October to April in each year, the orchestra gives 113 concerts. There are also 12 Young People's Concerts on Monday and Tuesday afternoons. The programs performed at the Young People's Concerts are correlated with the music appreciation courses held as a part of required curricula in all the public, secondary and high schools of Chicago and also with music appreciation courses given in parochial and private schools. Booklets listing the works to be performed and containing extensive biographical and historical material relating to the composers and the compositions, and analyzing and describing the numbers to be played, are distributed by the Association to the schools prior to the concerts, for use by teachers in conducting their courses in music appreciation. Its work in this regard is educational in promoting understanding and appreciation of music by our school children and the public at large.

In 1919 the Association founded a school for the musical education and training of young symphony players under the name of The Civic Orchestra, which has continued in existence ever since, with increasing usefulness. The student players number about fifty and are recruited from all over the United States. They take regular courses of study in harmony, composition and counterpoint in classes conducted by members of the Chicago Symphony Orchestra. They also rehearse under the direction of the principal players of the various sections of that orchestra. The courses continue uninterruptedly from October to April of each year. Private instruction is provided for specially talented students. Their orchestra, The Civic Orchestra, gives several concerts each season. The players rehearse regularly twice each week during the October-April period under the direction of the Assistant Conductor of the Chicago Symphony Orchestra. Each student pays a fee of \$10.00 per annum. They receive no pay. From the ranks of The Civic Orchestra have gone scores of men and women to orchestras throughout the country. About half of the Chicago Symphony Orchestra's members come from The Civic Orchestra.

The Association owns and maintains an extensive library containing more than 9,900 scores, other musical works, books and manuscripts. Many of these scores and other works are not available elsewhere in the United States. These works are used by the Orchestra, by students of The Civic Orchestra and are loaned without charge to other orchestras. The auditorium, library and offices of the Association are located in the building known as Orchestra Hall at 216-220 S. Michigan Avenue, Chicago, Illinois. The building is owned by the Association. It was completed in December 1904 and was financed by gifts from over 8,500 people from all walks of life who gave contributions for the purchase of the real estate and construction of the building. The auditorium has a regular seating capacity of 2,582. For years the Cook County Assessor has ruled that that portion of Orchestra Hall actually devoted to the purposes of the Association is exempt from real estate tax.

The Association derives its income from the following sources. Sale of tickets to its concerts, income from endowment funds, all of which have been donated by individuals interested in promoting the purposes and objectives of the association; sale of advertising space in its concert programs, rentals

charged for the Auditorium when not in use for concerts; rentals charged for office and other space in Orchestra Hall not utilized for the purposes of the Association; royalties from the sale of phonograph records of performances of the Orchestra, the telecasts and donations by persons, firms and corporations interested in promoting the objectives of the Association.

It further appears that there have been annual deficits as follows:

Year ending May 31, 1949.....	\$ 2,042.00
Year ending May 31, 1950.....	33,188.00
Year ending May 31, 1951.....	29,995.00
Year ending May 31, 1952.....	84,243.00
Year ending May 31, 1953.....	40,292.00

All income of the Association since its organization has been applied toward its corporate purposes, viz., the promotion of the musical art, by the methods above described.

Men in the Armed Forces are admitted free to all concerts for which tickets are available. For example, during 1952-1953 approximately 1,000 servicemen were admitted free. Free tickets are also distributed to settlement houses and during 1952-1953 approximately 600 tickets were distributed to the Young People's Concerts.

No part of the income or profit has ever been and never can be paid to any individual member, trustee or officer by the Association.

The ordinance was held to be constitutional in *Stipka v. City of Chicago* (1950), 405 Ill. 374, as an occupation tax. The decision is not helpful in determining what the City Council meant when it used the words "for gain or profit." The use of these words seem to have caused confusion among corporations organized not for profit and engaged in amusement activities.

Without discussing the various interpretations of the words "for gain or profit" or "public exhibitions for profit", it seems to us that whether the Association is to be exempt from the application of the amusement tax should be approached first on the basis that perhaps the objectives, purposes and activities of the Association bring it within the statutory exemptions from taxation under the Revenue Act.

In *People v. Y. M. C. A.* (1937), 365 Ill. 118, the charter issued to the YMCA under the Constitution of 1848 exempted it from taxation, either by state, county, municipal or other authority, certain real estate and empowered it to purchase, hold, enjoy and convey other real estate for the purpose of establishing and maintaining free libraries and reading rooms and "for benevolent and religious purposes", and the same, while it shall be held or owned by or for said association, for its own use, together with all personal property held or owned by it or for said association, shall be in like manner exempt from taxation.

Chapter 120 (Revenue Act, Par. 500 of Illinois Revised Statutes 1953), providing for properties exempt from taxation, sub-paragraph (1) includes:

"* * *; all lands, moneys or other property heretofore or hereafter donated, granted; received or used for public school, college, seminary, university, or other public educational purposes, and the proceeds thereof, whether held in trust or absolutely."

And sub-paragraph (7) includes:

"All property of institutions of public charity, all property of beneficent and charitable organizations, whether incorporated in this or any other state of the United States, and all property of old people's homes, when such property is actually and exclusively used for such charitable or beneficent purposes, and not leased or otherwise used with a view to profit; and all free public libraries."

There is little difference between the charter provisions in the *YMCA* case and the statutory provisions above quoted. In the *YMCA* case the court said (p. 122):

"Charity, in law, is not confined to the relief of poverty or distress or to mere alms-giving, but embraces the improvement and promotion of the happiness of man. A charity is a gift to the general public use which extends to the rich as well as to the poor. The principal and distinctive features of a charitable organization are that it has no capital stock and no provision for making dividends or profits for private gain. It derives its funds mainly from the public and private charity and holds them in trust for the objects and purposes expressed in its charter. The charitable nature of an organization depends upon whether its object is to carry out a purpose recognized in law as charitable, or whether it is maintained for gain, profit or private advantage. An institution does not lose its charitable character by reason of the fact that the recipients of its benefits who are able to pay are required to do so, where no profit is made by the institution and the amounts so received are applied in furthering its charitable purposes and whose benefits are refused to none on account of inability to pay therefor."

The court then held, as to the *YMCA* (p. 123):

"* * *. Its primary purpose is charity—not making of a profit."
* * * ,

and that the "operation and maintenance of the restaurant, cafeteria, laundry and haberdashery were purely incidental to the furnishing of rooms in which the men live and were likewise exempt from taxation."

In *Corbin YMCA v. Commonwealth* (1918), 181 Ky. 384, 205 S. W. 388, 1 A. L. R. 264, the *YMCA* was convicted of operating a restaurant without a license. In this case the license was held to be an occupation tax. The court held that the word "institution" used in connection with the exemption includes:

"not only their property, but also necessarily all their activities which are consistent with the furtherance of the purposes for which they were organized. * * *. Being of the opinion that an institution of public charity, as it is agreed that appellant is, is by our constitution exempt, not only from the payment of ad valorem or property taxes, but also from the operation of any and every revenue producing measure upon such of its activities as are confined to, done in furtherance of, and not inconsistent with the charitable purposes for which it was organized, it results that appellant is not liable to the payment of a restaurant tax under Section 224 and the judgment is therefore reversed."

The Illinois and Kentucky courts held that the exemption was applicable to the operation of the restaurant, etc., as incidentals to the main objects of the *YMCA*.

In *School of Domestic Arts v. Carr* (1926), 322 Ill. 562, 568, the court said:

"It is the primary use to which the property is put which determines the question whether it is exempt from taxation, and the conclusion in each case depends upon the facts applicable thereto, * * *. A charitable use, where neither law nor public policy forbids, may be applied to almost anything that tends to promote the well doing and well being of social man."

Of like import are the decisions rendered in *People v. Walters Chapter D. A. R.* (1924), 311 Ill. 304 and in *Krause v. Peoria Housing Authority* (1939) 370 Ill. 356, 366, where the court said:

"There is no fixed rule by which it can be determined whether an organization is a charitable one. Each case must turn on its particular facts."

In *People v. Deutsche Gemeinde* (1911), 249 Ill. 132, 137, the court held:

"A school, within the meaning of the constitutional provision, is a place where systematic instruction in useful branches is given by methods common to schools and institutions of learning, which would make the place a school in the common acceptance of the word."

From the foregoing facts, the statute and the decisions relative thereto, we are of the opinion that the association, in giving concerts and providing educational facilities free of charge to public and parochial schools as referred to above, is exempt from the application of the amusement tax as provided for in Chapter 104 of the Municipal Code of Chicago. It is to be understood, however, that the amusement taxes which have been voluntarily paid by the Association since 1947 are not affected by this opinion, since said payments of the tax were voluntary and no facts were submitted to the City Collector or to this office prior to the present time, which would indicate that the Association was so exempt from said taxation.

This exemption is not applicable to the annual license fee requirements under Chapter 104.1 of the Municipal Code of Chicago (Sections 104.1-1 to 104.1-9) nor to the Association or its lessees when its auditorium is rented to producers and do in fact present amusements for personal gain or profit.

We need not consider the interpretation of the words "for gain or profit" as used in the ordinance.

LYRIC THEATRE

(No. 11900—City Collector—M. I. W.—April 22, 1955.)

In your letter of December 23rd you enclosed a copy of a letter received from the Lyric Theatre of Chicago in response to your demand for payment of amusement tax in an amount equal to three percent of the gross receipts for November opera performances conducted by them at the Civic Opera House.

It is claimed by the Lyric Theatre that as a "not for profit corporation" performing Grand Opera which has been exempted from Federal Income Tax by reason of having shown to be organized and operated exclusively for educational purposes, they are exempt from payment of Chicago's amusement license tax.

Section 104-1 of the Municipal Code defines "amusement" as meaning "any theatrical, dramatic, musical or spectacular performance". Presentations of grand opera fall clearly within this definition.

Section 104-2 imposes a tax "upon all amusements within the City * * *" and makes it unlawful for any person to produce, present or conduct any such amusements, for gain or profit, without payment of the tax.

This office has had frequent occasions to pass on the question raised in your communication.

The fact that the Lyric Theatre of Chicago is a duly organized not-for-profit corporation does not in and of itself constitute a ground for exemption. In an opinion addressed to you dated October 25, 1949, wherein this same question was raised in regard to the amusement tax ordinance, we stated:

"There is no provision in the ordinance exempting any person from the payment of the tax. Consequently the fact that Chicago Tribune Charities, Inc., is organized as a non-profit corporation furnishes no basis for exempting it on that ground."

To the same effect we stated in an opinion dated December 12, 1947, to the Chairman of the City Council Committee on Finance, as follows:

"* * * But the mere fact that the amusement is offered by or for a non-profit corporation or that the net receipts therefrom are used for religious, educational or eleemosynary purposes does not exempt it from the tax, if the amusement is produced, presented or conducted in a regular course as a profession or in the operation of an amusement business."

The facts in the instant case are that the operatic performances were conducted with the use of professional performers who were compensated for their appearances. They were thus engaged for gain in their regular occupations as professional singers, musicians, etc. The Lyric Theatre in arranging and presenting these performances was engaged in the presentation of an amusement for gain. The fact that no profit may have been realized is of no matter since the tax is imposed on the gross receipts and not on net profits. By the same reasoning, the fact that had a profit been realized it would have gone to further the purpose of promoting public interest and benefit from grand opera performances is of no moment in the determination of liability for the tax.

It is, therefore, our opinion that the Lyric Theatre of Chicago is subject to the payment of the City's amusement tax for performances of grand opera conducted by it in the Civic Opera House.

AMUSEMENT DEVICE

(No. 11903—City Clerk—E. W. P.—May 9, 1955.)

We have your letter of May 5, 1955, requesting our opinion as to whether or not you are permitted to allow a transfer of license to a new automatic amusement machine where the licensee purchases a new machine and applies to your office for a transfer of the license without the surrender of his original license and sticker emblem, but with his representation that the machine upon which a license and sticker emblem had been issued was stolen together with theft of the attached license and sticker emblem.

You advise us that beginning January 1, 1955 you instituted a new method of issuing automatic amusement machine licenses which requires the licensee to submit an application for license, upon which application the license number is stamped, and a sticker emblem bearing the license number is issued. Thereafter, the application which has been stamped with the license number is photostated and the negative copy of the photostat is sent to the licensee, which copy constitutes his license.

Section 104-4 through 104-6 of the Municipal Code, contain the requirements pertinent to licenses for Automatic Amusement Machines, within the general provisions relative to amusements. Section 104-6 provides as follows:

"The City Clerk shall deliver *with each license a sticker emblem* which shall bear the words 'Automatic Amusement Machine' and 'Chicago' and the numerals designing the year for which such license is issued, a reproduction of the corporate seal of the city, the names of the mayor and city clerk, and a number identical with the number of such license. The city clerk shall change annually the predominant background color of such license emblem.

"It shall be the duty of the licensee to affix the sticker license emblem in a conspicuous place on the licensed automatic amusement machine and it shall be unlawful for any person to mutilate or remove said emblem from the automatic amusement machine during the year for which it is licensed." (Italics supplied)

It is our opinion that to comply with the Code, the sticker license emblem cannot be issued to the applicant until the license, regardless of its form, is ready to be delivered, and is delivered simultaneously with the sticker license emblem. You do not request an opinion on this point, but in view of the contents of the letter before us, we believe that it is our duty to advise you. This requirement is more clearly apparent by reference to the language contained in Section 104-5, which makes it unlawful for any person to keep, maintain, or use any automatic amusement machine for which a license has not been issued.

The provisions of Section 104-4 relate to a license tax to be imposed upon *each* automatic amusement machine. Section 104-5 provides that the license shall issue in the name of the owner of the automatic amusement machine. Section 101-18 contains the requirements for assignment or transfer of licenses from one person to another. This latter provision is applicable only where the *ownership* of the *machine* was being assigned or transferred. This is obviously the provision you describe in the third paragraph of your letter and it does not relate to transfer of license from one machine to another machine. There is no provision in the Code for this latter transfer.

Section 101-21 provides as follows:

"In case any licensee who has been furnished a plate, badge, tag, emblem, or other insignia in accordance with the provisions of this code shall lose the same, it shall be within the discretion of the mayor to authorize the issuance of a duplicate insignia, upon the making of an affidavit of loss by such person and the payment of a fee of fifty cents to the city collector."

This section in our opinion would relate to an instance where the automatic amusement machine was in the possession of a licensee and the sticker emblem bearing the license number had disappeared or had been stolen. In that case it would be within the discretion of the mayor to authorize the issuance of a duplicate sticker emblem to be placed upon the licensed automatic amusement machine.

It is, therefore, our opinion, based upon an analysis of the licensing provisions in the Code that where an automatic amusement machine has been stolen, you are not permitted to allow a transfer of the license to another machine.

CHICAGO BUSINESSMEN'S ORCHESTRA

(No. 11978—City Collector—H. A. C.—November 2, 1955.)

With your communication of October 18, 1955 you transmitted a letter from the Chicago Business Men's Orchestra dated October 14, 1955 in which they request exemption from the City Amusement Tax. The facts set forth in said letter, and upon which the Chicago Business Men's Association bases its request for possible exemption, are substantially as follows:

The Chicago Business Men's Orchestra was founded in 1921 as a non-profit Illinois corporation, and its corporate purpose as stated in Article I of its charter, is

"* * * to establish and maintain in the City of Chicago, Illinois, and without pecuniary profit to its members, a symphony orchestra, composed of musicians whose principal vocations are other than musical; to foster and encourage the production of orchestral and instrumental music, and to give public and private performances of the same with or without an admission charge therefor; to foster and develop closer social relationships between the amateur and profes-

sional musicians of Chicago; to educate the public in symphonic literature and to encourage attendance at symphonic concerts as a cultural pursuit."

The orchestra, in conjunction with the Civic Music Association makes an occasion of the annual presentation of an award to the individual who has contributed the most to the advancement of music in the Chicago area during the year. Although no member of the Orchestra receives remuneration, the conductor, associate conductor and executive secretary receive small salaries. Occasionally extra players are hired at regular Union Scale. It further appears that for fiscal year ended June 30, 1955, its revenue was \$7,225.35 of which \$3,079.60 was derived from ticket sales, \$2,083.00 was received from associate members and the balance was derived from members and other contributions. All of the proceeds for the year were expended for hall rental, salaries of the conductor, associate conductor, executive secretary, and all other costs and expenses including soloists. After paying \$154.88 City Amusement Tax the orchestra realized a net gain of \$143.37. Concerts are held three times a year, to which admission fees are charged. Sales are open to the general public.

Numerous requests for exemption from payment of the Chicago Amusement Tax have been made by divers organizations, particularly those organized as non-profit corporations. Opinions have been rendered by the Corporation Counsel either allowing or disallowing the exemption. Because of the frequency of the exemption requests, we are once again submitting a comprehensive explanation of the application of the Chicago Amusement Tax to non-profit corporations.

The statutory basis for the 3% gross receipts tax on amusements is Section 23-54 of the Revised Cities and Villages Act which empowers the city—

"To license, tax, regulate, or prohibit * * * theatricals and other exhibitions, shows and amusements * * *." (Chap. 24, par. 23-54, Ill. Rev. Stat. 1953, p. 545.) Section 104-1 of the Municipal Code of Chicago defines "amusement" to mean:

"(1) any theatrical, dramatic, musical, or spectacular performance, motion picture show, flower, poultry or animal show, animal act, circus, rodeo, athletic contest, sport, game or similar exhibition for public entertainment, including, without being limited to, boxing, wrestling, skating, dancing, swimming, racing or riding on animals or vehicles, baseball, basketball, softball, football, tennis, golf, hockey, track and field games, bowling, billiard and pool games.

(2) any entertainment offered for public participation, including, without being limited to, dancing, carnival, amusement park rides and games, bowling, billiard and pool games."

Section 104-2 imposes a license tax upon all amusements within the city (excepting automatic amusement machines which are otherwise taxed) in an amount equal to 3% of the gross receipts from admission fees or other charges, exclusive of federal taxes, to witness or to participate in such amusements. The same section makes it unlawful for any person to "produce, present or conduct" any amusement, "for gain or profit", without payment of the tax.

The constitutionality of the amusement tax was upheld in *Stiska v. City of Chicago*, 405 Ill. 374 (1950) and it was held that the tax is an occupation tax upon those engaged in furnishing the amusement, and is measured by the gross receipts from the admission fees or other charges collected to witness or to participate in the amusement.

Clearly, the proposed concerts are "amusements" within the meaning of that term as defined in Section 104-1 of the Municipal Code.

Does the fact that the Chicago Business Men's Orchestra is a non-profit corporation per se exempt it from the tax? There is no provision in the

ordinance exempting any person from the payment of the tax. (See Vol. 23 of Corporation Counsel Opinions, p. 464, Number 11194.) The test of taxability is not whether the person conducting the amusement is organized as a "profit" or "non-profit" organization or corporation, but whether the amusement produced or presented by it is conducted with the view of making a gain or profit therefrom. As one of the corporate objects of the orchestra is "to give public and private performances with or without admission charges" and as admission is to be charged for the proposed concerts, it follows that a gain or profit is contemplated for the concerts.

Consideration must be given to the question as to whether or not the amusements to be presented are conducted as an occupation or business. In determining whether a social club, organized as a non-profit corporation, serving food and drink to its members but not to the public is subject to the Illinois Retailers' Occupation Tax the Illinois Supreme Court in *Svithoid Singing Club v. McKibbin*, 381 Ill. 187 (1942) held that a tax is not due and payable where sales are merely incidental to a business which the vendor was licensed or authorized to transact. Based on the *Svithoid* decision we have held that the occasional presentation of an amusement as an isolated instance is not subject to the tax because it does not constitute engaging in such venture as an occupation or business. Opinions of Corporation Counsel numbered 11254 and 11255, Vol. 23, pgs. 475 and 476 (1950). The *Svithoid* case and other cases arising under the Retailers' Occupation Tax were analyzed in 38 Illinois Law Review 107 where it was pointed out that confusion exists in applying the test of "isolated and occasional" or "regular and continued" in determining liability under the tax as an occupational tax, and concludes with the following statement:

"Nothing seems more equitable than for the Courts to keep pace with the changes which have occurred necessitating the enlarged judicial perception of the Act as presented by the actual effects, and to adopt the view that every person (not a class of vendors) engaged in the business of selling tangible personal property for use and consumption and not for resale would be subject to the tax. There seems to be no valid reason why the Svithoid Club cannot be a social club for its purpose of incorporation and engaged in the business of selling at retail for the purpose of taxation within the Act (Retailers' Occupational Tax) (parentheses supplied). With the removal of the conception that the tax is imposed only on a class of vendors and through the application of the 'isolated and occasional, or regular and continual' test, no doubt a decision more in keeping with the present spirit and meaning of the Act, and measured by its results and effects, would have prevailed."

We have fully considered the opinion of February 6, 1953, (Opinions Corporation Counsel Vol. 23, p. 486) exempting previous concerts of the Chicago Business Men's Orchestra from payment of the amusement tax, but in view of the foregoing considerations it is our opinion that the three concerts given each year by the Chicago Business Men's Orchestra constitute a primary portion of its activities and corporate objects and are not "isolated and occasional". We are of the further opinion that it is subject to the 3% City Amusement Tax on the gross receipts from its concerts, exclusive of Federal tax.

INTERNATIONAL LIVESTOCK EXPOSITION

(No. 12127—City Collector—A. F. G.—June 19, 1957.)

This will acknowledge receipt of your letter of December 5, to which was attached a copy of a letter to you from Winston, Strawn, Smith and Patterson, attorneys for the International Livestock Exposition Association, in which they claim immunity of the Association from the payment of the 3% gross receipts tax imposed by Section 104-2 of the Municipal Code of Chicago.

In your letter you state that on November 16, 1956 you notified the Association that it was subject to said tax in view of an amendment to the section of the Code, which imposes the tax.

Section 104-2 consists of two sentences. The amendment adopted by the city council on September 26, 1956 added to the first sentence after the word "federal" the words "and state" and struck out of the second sentence after the word "amusements" the words "for gain or profit".

At about the time your letter was written the city council was considering an ordinance which would restore section 104-2 to the condition it was in prior to the September amendment. The Committee on License recommended the passage of this ordinance, and it was passed March 14, 1957. Later, another ordinance amending this section was presented and passed on June 7, 1957. This ordinance expressly exempts "any stock show or business show" and in our opinion exempts the shows conducted by the International Live-Stock Exposition Association from the payment of the 3% tax.

We delayed answering your letter until the city council had clarified its position on this controversial subject.

MAGIC MIRROR HOROSCOPE

(No. 12310—City Collector—W. J. K.—December 23, 1959.)

Your inquiry as to whether or not a device entitled "Magic Mirror Horoscope" is subject to licensing as an automatic amusement device by virtue of Chapter 104-1. According to the letter and photograph submitted, the device is described as follows:

An upright coin electrically-operated machine, with 3-selection buttons; that is, the first button is pressed on for the selection of one's birth month; the second button activates the machine and a printed card is ejected, on which a horoscope is given; on the third button, when pressed, releases a metal colored or "lucky pocket piece." (There are 6 different colors.)

The brochure states that the device is "ideal for theater, bus depots, taverns, airports, amusement centers, * * * everywhere", and that "bigger profits" are possible for the owner of the device. The colored lucky pocket pieces, or tokens, do not designate that they are of any value or redeemable for anything of value.

Section 104-1 of the Municipal Code of Chicago defines an automatic amusement device as follows:

104-1 "As used in this ordinance:

* * * The term 'automatic amusement machine' means any mechanical amusement machine or device, the operation of which is governed or controlled by the deposit of a coin or token including, without being limited thereto, any such coin controlled instrument or device capable of producing or reproducing any vocal or instrumental sounds (Passed Coun. J. 11-6-47, p. 1168; amend. 4-15-48, p. 2183). * * *

and Section 104-4 of the Municipal Code provides for the amusement license tax of automatic amusement devices as follows:

104-4 "Automatic Amusement Machines—Annual license tax. An annual license tax of twenty-five dollars is imposed upon each automatic amusement machine used within the city for gain or profit from operation (Passed. Coun. J. 11-6-47, p. 1168)." * * *

Webster defines the word "amusement" as synonymous with diversion, entertainment, recreation, past-time and sport. Our Supreme Court has used this definition in a number of cases, specifically in *City of Chicago v. Green Mill Gardens*, 305 L. 87 at page 93 and this case on this point again was cited in *Stiska v. City of Chicago*, 405 Ill. 374. Anyone participating or using this device, would do so for the purpose of diversion, entertainment or a past-time. The device is contemplated on being distributed and put into operation in places of public resort for gain or profit.

It is the opinion of this office that the device entitled "Magic Mirror Horoscope" is an automatic amusement device and comes within the purview and definition of Section 104-1 of the Municipal Code of Chicago and is subject to an annual license fee, as provided for in Section 104-4 of the Municipal Code of Chicago.

ACTIVITIES HELD AT SOLDIER FIELD

(No. 12316—City Comptroller—R. N.—January 28, 1960.)

You state that the Chicago Cardinals have not paid the city amusement tax for 1959 for games played at Soldier Field; that they claim exemption from payment of the tax by reason of the fact that the games are played at Soldier Field which is on Chicago Park District property; that you wish to be advised as to whether there is any basis for exempting from payment of the amusement tax any activity held at Soldier Field which would be taxable if it were held at another place in the city.

Sections 104.1-1 and 104.1-2 of the Code read:

104.1-1. As used in this ordinance a public place of amusement means any building or part of a building, park or other grounds used or intended to be used for any amusement as defined in chapter 104 of this code, excepting (1) an automatic amusement machine and (2) instrumental music by an orchestra of not more than three pieces in a hotel or restaurant where no dancing or other entertainment is permitted or in a place licensed for the sale at retail of alcoholic liquors where no other entertainment is permitted except dancing by patrons of such place under separate license.

104.1-2. It is unlawful for the owner or person in control of any property to produce, present or conduct thereon or to permit any person to produce, present or conduct thereon, for gain or profit, any amusement, other than those excepted in section 104.1-1, without first having obtained a license for a public place of amusement.

The language is clear. In section 104.1-1 "park or other ground" is included in the definition of a public place of amusement. In 104.1-2 the requirement of a license therefor is mandatory. No exception is made, other than those enumerated in 104.1-1. Thus the Chicago Park District is and has always been subject to the license requirement of chapter 104.1 (Public Places of Amusement).

This department has in the past written opinions on the subject of the conduct of amusements on property owned and operated by a municipal corporation. When the question arose as to the application of the tax requirement to a sport and boat show conducted on Navy Pier, owned and operated by the City of Chicago, this department held that when the International Sports, Travel and Boat Show leased the Navy Pier facilities it was required to obtain a public place of amusement license and guarantee to the city the payment of the tax notwithstanding that Navy Pier is city-owned property (Opinions of Corporation Counsel, Vol. 22, page 360). Likewise, in an opinion

to the city collector as to application of the tax requirement to athletic exhibitions presented on a commercial basis and operated for profit, held in stadia and fields owned and operated by the board of education, we held that the board of education, in leasing its facilities to professional promoters of athletic contests is required to procure a public place of amusement license and guarantee payment of the tax to the city (Opinions, Vol. 22, page 366). That opinion contains the following quotation from a prior opinion to the board of education:

"If, however, the Board of Education were to rent an athletic field or stadium for professional athletic contests or to professional promoters of athletic contests then our opinion would be that such contests are subject to the tax and the Board of Education would be required to procure a public place of amusement license pursuant to chapter 104.1 of the Municipal Code and guarantee the payment of the tax to the city."

It then goes on to say:

"The method to be pursued by you to collect the tax and require the Board of Education to procure licenses under chapter 104.1 of the Municipal Code should be the same as that pursued against any other person subject to the Amusements ordinance and to the Public Places of Amusements ordinance.

It is suggested that you forward the enclosed copy of this opinion to the Board of Education and that you follow it up with such appropriate action as may be necessary to enforce compliance with both ordinances."

In our opinion these opinions are conclusive. There is no basis for exempting from payment of the amusement tax any activity held on city or park district or board of education property which would be taxable if held at any other place. The fact that the park district refuses to guarantee payment of the tax as required by the ordinance cannot release from liability for payment of the tax the organization which conducts the amusement. In our opinion the procedure outlined in the last-quoted opinion should be followed in enforcing the provisions of the public place of amusement license ordinance against the Chicago Park District, and the tax provisions of the amusement tax ordinance against the producers of the amusement.

BUYING OUT THE HOUSE

(No. 12355—Acting Comptroller—A. F. G.—September 15, 1960.)

Your letter of July 25, 1960 is as follows:

"Various organizations from time to time raise funds by 'buying out the house' for theater performances and reselling the tickets so purchased at prices in excess of the box office list price. Assuming such organizations are exempt by the Municipal Code from payment of Amusement Tax, there nevertheless remains some question as to whether or not the producer of the show is subject to tax on the receipts from the sale of the house. Generally the producer sells the house at the box office price less Federal and City taxes. This leaves the producer with the same net receipts as he would have if he sold the tickets to the general public at box office prices including Federal and City taxes and then paid these taxes to the respective governmental bodies.

Probably the producer's receipts should not be taxable since if they were he might pass them on to the exempt organization, which

then in effect would be paying tax on a portion of their receipts. However we would appreciate receiving your legal opinion on this situation in order to guide us in our audits of Amusement Tax returns."

Section 104-1 of the Municipal Code of Chicago defines the word "amusement". Section 104-2 of the said Code imposes a license tax upon all amusements within the city, with certain exceptions, of three per cent of the gross receipts from admission fees and other charges to witness or participate in such amusements; provided, however, that such tax shall not apply or be imposed on any amusement the proceeds of which, after payment of reasonable expenses, inure exclusively to the benefit of certain organizations enumerated in the section. This exemption only applies to the specified organizations where they are the producers of the amusement.

In the case cited in your letter, the theater is liable for the tax. It may absorb the tax or pass it on the purchaser of admission tickets to the amusement. The fact that the purchaser of all the tickets to an amusement is an organization which if it were the producer of the amusement would be exempt from payment of the tax does not make it immune from payment of tax on admission tickets which it purchases if the theater elects to pass it on.

The organizations enumerated in the section are not exempt from taxes generally but only from such taxes as the ordinance expressly grants them immunity.

It is our opinion therefore that the theater is liable for the tax regardless of who is the purchaser of its admission tickets.

D. UNDERTAKER'S LICENSES

FUNERAL ESCORT SERVICE

(No. 11924—Alderman, 14th Ward—A. F. G.—July 7, 1955.)

In your letter of June 30, 1955 you say:

"I am in receipt of a request with reference to the possible establishment of a funeral escort service, the cars to be black in color and the word 'Escort' to be painted on the hood. I am in doubt as to the legality of such service and would appreciate your giving me an opinion on same."

We are not quite sure what is meant by a "funeral escort service". We can see no legal reason why a funeral director cannot provide a car or cars, distinctive in color and labelled "Escort" to head a funeral cortege, or if he has no such cars, to employ someone who has such escort cars to furnish the said service. In either case the use of such escort service would appear to be a valid procedure.

UNLICENSED OFFICER NAMED IN ADVERTISING

(No. 12043—President of Board of Health—M. C. H.—June 12, 1956.)

This is to acknowledge receipt of your letter dated May 22, 1956, in which you request a legal opinion as to whether or not an unlicensed officer of an undertaking corporation may associate his name as an officer in the advertising of the corporation.

You cite Section 181-1 of the Municipal Code of the City of Chicago, which reads as follows:

"It shall be unlawful for any individual to act as an undertaker, or to prepare a dead body for burial or cremation, or to manage a funeral, or to conduct, manage, or be in charge of an undertaking room, store, or place, or in any way to advertise or hold himself out to the public as an undertaker by card, sign, solicitation, or otherwise, without first obtaining a license as an undertaker."

Your attention is directed to an opinion rendered by the Department of Law, Volume XII, Opinions of Corporation Counsel and Assistants, found on pages 374-377, addressed to you as Commissioner of Health on August 27, 1923. In that opinion, we took the position that the language used in the Code at that time demonstrated that the purpose of the Code was to license and control those who will actively regulate undertaking rooms, direct funerals, or take immediate charge of the care of the dead to the end that laws of sanitation and health shall be enforced and that the feelings and sensibilities of bereaved relatives be respected, and not to reach or control the ownership (or corporate entity or its officers), as such, of undertaking establishments nor to determine who shall profit financially from their operation.

The only change in the language of the Section under discussion at that time and the language of the present Code is that the word individual is substituted for the word person.

Our opinion in the interpretation of the language of Section 181-1 of the Code as it pertains to your inquiry remains the same.

The words "conduct" and "manage" mean to guide, direct and regulate, while the other expressions used in the Code "to be in charge of", etc., are equally significant of the act of direction or regulation. No one of the expressions used signifies an officer of a corporation as such. The officer of a corporation as such is distinct and separate from the manager of an undertaking parlor or funeral director. The use of the name of the officer of the corporation is merely descriptive and is probably used to denote the substantial responsibility of the corporation as such and does not violate the Code.

NO LICENSE CERTIFICATE

(No. 12210—President, Board of Health—R. N.—March 4, 1958.)

You ask to be advised by this department as to how long a period of grace may be allowed for renewal after expiration of the "no license certificate" of an undertaker's assistant, provided for by section 181-7.1 of the Code.

From a reading of section 181-7.1 it is obvious that the purpose of the section is to enable a person qualified and authorized to act as an undertaker's assistant, who surrenders his certificate for given reasons, to keep alive his privilege of having the certificate renewed. The procedure necessary to keep alive this privilege is specifically set out. It is stated: "Each no license certificate shall be in force during one year following the date of its issuance and may, upon application to the board of health, be renewed annually * * *." The term "renewed" presupposes the existence of the thing to be renewed. A certificate which by its terms is limited in duration to a specified period is effective only for that period. At the expiration of the period the certificate is lapsed and, in effect, there is no longer any certificate

in existence. It follows that there can be no renewal of a non-existing certificate, unless provision is made for circumstances under which a lapse occurs. Such a provision appears in section 162-8 of the Code by which reinstatement of a lapsed plumber's license is provided for. No such provision appears in the ordinance here under consideration. Therefore there is no authority for the renewal of a lapsed "no license certificate" under section 181-7.1.

LICENSE REVOCATION — UNDERTAKING CORPORATION

(No. 12244—President, Board of Health—E. W. P.—August 6, 1958.)

We have your letter dated July 16, 1958, in which you request our opinion as to whether or not the Board of Health may issue a license as an undertaker to Mr. Gerald W. Marlin to operate an undertaking establishment under the name of Lucania & Company, Inc., at 409 W. North Avenue, Chicago, Illinois.

Your office advised me over the telephone that Mr. Marlin passed his examination to operate as a funeral director on May 24, 1956 and a license was issued to him to operate at 716 N. State Street, Chicago, Illinois. He now wishes to transfer this license to 409 W. North Avenue, showing the firm name under which he will operate as Lucania & Company, Inc., a corporation. Lucania & Company, Inc., was conducting the undertaking business as a corporation at 409 W. North Avenue, Chicago, Illinois prior to the revocation of the license held by Joseph J. Lucania on July 7, 1958.

You advise that at the time of the revocation of the license that the officers of Lucania & Company, Inc., were Joseph J. Lucania, President, Rose F. Lucania, Secretary and Vincent R. Lucania, Treasurer.

The application which Mr. Marlin makes discloses that the officers of the corporation at present are Joseph F. Lucania, President, the 19 year old son of Joseph J. Lucania, Rose F. Lucania, Secretary and Treasurer, the wife of Joseph J. Lucania and Sandra E. Lucania, Vice-President, the 16 year old daughter of Joseph J. Lucania. None of the present officers of the corporation are licensed as undertakers.

Section 73.8a of Chapter 111½ of the Illinois Revised Statutes provides as follows:

"Practice by corporation, partnership, etc.—Trade names.

No corporation, partnership or association of individuals, as such, shall be issued a certificate of registration as a registered funeral director, nor shall any corporation, partnership, firm or association of individuals, or any individual connected therewith, publicly advertise such corporation, partnership or association of individuals as being registered funeral directors; Provided, however, that any person of good moral character and temperate habits who was engaged in the practice of funeral directing on July 1, 1935, as an owner, member or employee of a corporation, partnership, association, or any corporation, partnership or association so engaged, shall be permitted to continue to engage in the practice of funeral directing and to publicly advertise as being so engaged, if the said owner, member or employee shall have complied with all other provisions of this Act.

No licensee, and no partnership or association of licensees, formed since July 1, 1935, shall engage in the practice of funeral directing under a tradename or partnership or firm name unless in the use and

advertising of such trade-name, partnership or firm name there be published in connection therewith the name of the owner or owners thereof as such owner or owners."

Section 181-1 of the Municipal Code provides:

"It shall be unlawful for any individual to act as an undertaker, or to prepare a dead body for burial or cremation, or to manage a funeral, or to conduct, manage, or be in charge of an undertaking room, store, or place, or in any way to advertise or hold himself out to the public as an undertaker by card, sign, solicitation, or otherwise, without first obtaining a license as an undertaker.

In conducting any business under a license herein provided for, no licensee shall use, or join in using, as part of or in connection with the name under which said business is conducted, the name of any person who is not both licensed hereunder and actually engaged in said business; provided, however, that any person of good moral character and temperate habits who on July 1, 1935 was engaged in the practice of funeral directing as defined in an act of the General Assembly of the State of Illinois entitled 'An Act in relation to the regulation of persons engaged in the practice of funeral directing and embalming, and to repeal an Act therein named', filed July 8, 1935, as an owner, member or employee of a corporation, partnership or association, or any corporation, partnership, or association so engaged, shall be permitted to continue to engage in the practice of funeral directing, as so defined, and to advertise publicly as being so engaged, if the said owner, member or employee shall have complied with all other provisions of this chapter."

Prior to the revocation of the license held by Joseph J. Lucania he had been permitted to use or join in using the name of Lucania and Company, Inc., a corporation, by virtue of the fact that he was so engaged, prior to July 1, 1935 under the Statute and Municipal Code. However, Mr. Gerald W. Marlin does not qualify and no one else can qualify so as to continue the name and operation of Lucania & Company, Inc., a corporation, as an undertaking establishment.

Mr. Marlin received his license in 1956 and the Statute and the Code require that the existence of the corporation and the person engaged in the practice of funeral directing must have been simultaneous on or before July 1, 1935. Upon the revocation of the license held by Joseph J. Lucania on July 7, 1958, Lucania & Company, Inc., a corporation, lost its identity as a funeral director and cannot be revived under any circumstances.

It is, therefore, our opinion that the application of Mr. Marlin to have his license transferred showing the firm name under which he proposes to operate as "Lucania & Company, Inc.," be denied.

FUNERAL DIRECTOR NOT LICENSED EMBALMER

(No. 12293—President, Board of Health—E. W. P.—August 5, 1959.)

This is to acknowledge receipt of your letter to this office in which inquiry is made whether or not the Supreme Court's decision of the State of Illinois in the case of *Elmo Gholson, Appellee v. C. Hobart Engle, Director of Registration and Education, Appellant*, affects the licensing of undertakers in the City of Chicago due to the fact that that decision gives persons having a funeral director's license the privilege of operating in the State of Illinois without also having an embalmer's license, as provided in Chapter 181-2 of the Municipal Code of Chicago.

The court in the case of *Elmo Gholson, Appellee v. C. Hobart Engle, Director of Registration and Education, Appellant*, Volume 9, Ill. 2nd, page 455 at 459 stated:

"* * * Without question the activities of funeral directors and those of embalmers are subject to regulation. The disputed issue is whether the interest of the public carries further and justifies the compulsory partial merger of their activities by requiring that a funeral director have the knowledge, skill and training of an embalmer before he can direct a funeral. *In our opinion it does not.*"

The court in the above case, on page 460, further held:

"The record does not, in our opinion, establish that public health considerations justify the requirement that a funeral director be a licensed embalmer. The funeral director is concerned primarily with the amenities of the funeral service. Proper performance of his other functions, such as removing and dressing the body, ascertaining the cause of death, and inspecting the body while it is in the coffin, does not require a year of college, nine months at an embalming school and a year's service as an apprentice embalmer. Nor are these qualifications necessary in order that he may effectively supervise the work of the embalmer. Specialized training is not required in order to recognize the conditions that require further work on the part of the embalmer. *We hold, therefore, that the circuit court was correct in determining that this provision violates section 2 of article II of the constitution.*" (Emphasis supplied.)

The court, in substance, decided in the above entitled case that any qualified funeral director holding a registered certificate as such is not required to also hold a registered certificate as an embalmer.

In view of the court's holding in the above entitled case, it is our opinion that any person holding a funeral director's certificate from the State of Illinois is entitled to have a license issued to him as a funeral director by the Chicago Board of Health notwithstanding the fact that he does not also hold a registered certificate as an embalmer. This opinion also conforms with an oral opinion given to you in May of this year by Assistant Corporation Counsel Maurice C. Handelman.

E. PUBLIC VEHICLE LICENSES

SIGHTSEEING BUSES

(No. 11921—Commissioner of Police—E. E. M.—July 1, 1955.)

We are in receipt of your letter of June 10 in which you request our opinion as to the legality of certain operations of sightseeing busses at Navy Pier and various other locations in the city.

Predicated on the facts contained in your letter we are of the opinion that:

1. Sightseeing busses may not be parked in officially posted "no parking" zones (Sec. 27-122(a) (13) of the Municipal Code of Chicago);
2. Sightseeing busses must be parked either in designated bus stands or bus terminals (Sec. 27-139(a));

3. Officials or employees of sightseeing bus companies may not solicit passengers and offer bus service "except on sightseeing tours or chartered trips" (Sec. 28-21 of the Municipal Code). A chartered trip is the subject of an agreement whereby a sightseeing vehicle is hired for a fixed charge per trip, agreed upon in advance, without consideration for the number of passengers.
4. Passengers may be solicited by these operators at officially designated "bus stands" only; and,
5. That these operations do not constitute a violation of Section 36-49.1 of the Municipal Code of Chicago because this is not a sale, offering or exposition for sale, or solicitation to purchase an *article*. A bus ride is not an "article": it is a service.

SIGHTSEEING VEHICLES

(No. 11970—Public Vehicle License Commissioner—E. E. M.—October 20, 1955.)

This will acknowledge receipt of your letter of October 6, 1955, in which you ask if there is a prohibition against your issuing additional public passenger vehicle licenses for sightseeing vehicles.

After a thorough study of Chapter 28 of the Municipal Code, it is our opinion that no such prohibition exists. It was noted that the number of livery vehicle licenses is limited by Section 28-19 and that the number of taxicab licenses is limited by Section 28-22.1. Chapter 28, however, places no restriction on the number of sightseeing vehicle licenses which may be issued.

We are of the opinion, therefore, that the Commissioner can legally issue additional sightseeing vehicle licenses.

POWER TO REGULATE TAXICABS AT O'HARE FIELD

(No. 11981—Public Vehicle License Commissioner—L. A. W.—November 22, 1955.)

You requested our opinion as to whether or not the City of Chicago can regulate the taxicab operations at O'Hare Field.

You stated over the telephone that you received numerous complaints from Chicago taxicab operators that after taking passengers to O'Hare Field they are compelled to return to the City without a load because of a great number of taxicabs from other communities who have made a practice of picking up passengers at O'Hare Field.

In an opinion dated August 12, 1955, this office stated: "That O'Hare Field which (1) is owned by the City of Chicago, and (2) lies outside of the corporate limits of the City of Chicago, and (3) does not lie within the corporate limits of any other municipality shall be subject to the ordinances, the same as the property owned by the City of Chicago which lies within the corporate limits thereof".

Under Chapter 24, Section 23-107, Ill. Rev. Stat. 1953, the City of Chicago was given authority to operate and control O'Hare Field. It is, therefore, our opinion that inasmuch as the City of Chicago owns and controls the airfield, we have the authority to regulate the use of same.

By virtue of this authority you may, therefore, adopt a rule that taxicabs which are not licensed by the City of Chicago may discharge passengers at O'Hare Field but not allowed to pick up any passengers.

POLICEMAN AS PUBLIC VEHICLE LICENSEE

(No. 12104—Public Vehicle License Commissioner—E. E. M.—January 30, 1957.)

We have your letter of January 18, 1957, in which you request an opinion as to the permissibility of a member of the Chicago Police Department "holding", or being the licensee of, a Public Passenger Vehicle License.

Members of the Chicago Police Department are not excluded as applicants under the terms of the Public Passenger Vehicle Ordinance. Therefore, they may legally apply for, and if found qualified, receive and hold said license, subject, however, to all provisions of the ordinance.

However, Rule 378 of the police department regulations prohibits participation of police officers in other "occupations" or "business". A rule of reason must be applied here and it is our opinion that reason dictates that a mere "holding" of a public vehicle license does not violate the purpose of this rule. However, we deem it unwise for a policeman to hold such a license. If one is issued to a police officer, we suggest that the Commissioner of Police be notified.

TAXICAB'S TORT LIABILITY

(No. 12145—Public Vehicle License Commissioner—J. F. G. and E. V. H.—July 19, 1957.)

Your letter of June 11, 1957, recites a complaint by Mr. Sokol of the Checker Taxi Company that when named as co-defendants in accident cases, some of the associations serving taxicab licensees particularly American-United always request that the association be dismissed from the case on the ground that the association is not a licensee.

You refer to Section 28-23 of the Public Passenger Vehicle Ordinance, state that all of the insurance furnished by individuals belonging to such associations includes the name of the association, and ask how you can stop the practice complained of.

The pertinent part of Section 28-23 provides:

"Every taxicab shall have the cabman's name, telephone number and the public passenger vehicle license number plainly painted in plain Gothic letters and figures of $\frac{3}{8}$ inch stroke and at least 2 inches in height in the center of the main panel of the rear doors of said vehicle. In lieu of the cabman's telephone number the name and telephone number of any corporation or association with which the cabman is affiliated may be painted in the same manner, provided such corporation or association shall have assumed equal liability with the cabman

for any loss or damage resulting from any occurrence arising out of or caused by the operation or use of any of the cabman's taxicabs and shall carry and furnish to the commissioner public liability and property damage insurance to secure payment of such loss or damage as provided in Section 28-12."

Since you state that all insurance furnished to the Commissioner by individual licensees belonging to corporations or associations covers both the licensee and the corporation or association, it is our opinion that such corporation or association may be properly sued as a party defendant in accident cases. However, it is still necessary to identify the licensee as the person legally responsible for the accident and unless the name, state license or city license numbers of the licensee or his taxicab are known, it is virtually beyond the power of the Public Vehicle License Commissioner, or the corporation or association with which the licensee is affiliated to determine who may be liable for the injury or damage claimed and who is the insurer of the particular vehicle involved to whom the service corporation or association may look for indemnity in case of suit. In such case the defendant association or its insurer defending the suit has no choice but to deny ownership or control of the vehicle involved; otherwise ownership or control is legally admitted without recourse to indemnification in case of judgment.

We have given much thought to this subject in our many drafts of ordinances to foreclose such defense and confess we have as yet found no airtight provision to attain our objective. The difficulty is inherent in the policy of licensing individuals whose names are unknown to the public, although painted in plain and large letters in the center of the main panel of the rear doors of the cab which is unobserved because of the emphasis of the color scheme trade name or emblem and telephone number of a corporation or association used by all members thereof, or if the name of the licensee is observed, it is not remembered by the passenger or other victim of the accident or by witnesses at the scene.

NOMINAL LICENSEE

(No. 12170—Public Vehicle License Commissioner—J. F. G.—October 22, 1957.)

It appears from your statement that Public Taxi Service, Inc. (hereafter Public) has an arrangement with persons who purchase vehicles for taxicab operation in the name of Public which becomes the registered owner of the vehicles and the public passenger vehicle licenses. In consideration of payment of the purchase price and a monthly charge for storage and washing of the vehicles, the payment of insurance premiums, union dues, workmen's compensation, and all license and inspection fees, each purchaser of a vehicle drives it, and collects and keeps all fares paid by passengers carried for hire at meter rates. The questions are what is the relationship between the city and Public as the nominal licensee, and the relationship between Public and the drivers, to qualify for renewal of its licenses for the year 1957.

Public is the registered owner and licensee of the vehicle. It carries workman's compensation for each man operating and driving the licensed public passenger vehicle. Public has been in possession and control of the public passenger vehicle licenses which have been renewed annually by the Public Vehicle License Commissioner since 1932. The control of said licenses since then is evidenced by the surrender of 25 licenses on December 22, 1937, pursuant to amendment of the contract ordinance of 1934, designed to reduce the number of taxicabs in the city to be licensed for operation.

For all legal purposes Public is the owner of the vehicles for which public passenger vehicle licenses have been issued and reissued in the name

of Public for more than 20 years, pursuant to Chapter 28 of the Municipal Code of Chicago.

Section 28-9 of said Code as amended in 1951-1952 prohibits Public from leasing or loaning its licensed public passenger vehicles for operation, and requires said vehicles to be driven by chauffeurs hired by Public as its agents or employees, in the manner prescribed by Public. The only evidence of the relationship of master and servant between Public and the persons driving the licensed vehicles for hire within the city is the provision for workmen's compensation, which is assumed by Public, and the responsibility of Public as the licensee for damage to persons and property resulting from the operation, which is covered by insurance also paid for by Public.

The purpose of the provisions in Section 28-9 is to identify the person responsible to passengers and the public for the safe operation of public passenger vehicles, in the event of suit for damages caused by the negligence of a driver.

Upon the facts disclosed, we believe that the relationship between Public and its drivers meets both the letter and the purpose of the ordinance to entitle it to renewal of its licenses.

Ed. Note: See Opinion No. 12309 page 390 at 393.

SOLICITING LIVERY PASSENGERS

(No. 12302—Public Vehicle License Commissioner—E. V. H.—October 19, 1959.)

Your letter of October 14, 1959, to John C. Melaniphy, Corporation Counsel, enclosing a copy of a letter from Francis J. Lynch, an attorney representing Suburban Transit Associates, has been referred to us.

In his letter, Mr. Lynch relates the circumstances under which Suburban Transport Associates operates a limousine service between certain southern suburbs and Midway and O'Hare Airports. He states that his client maintains at the counter of the Lake Central Airlines Terminal, at Midway Airport, a box entitled "Park Forest Limousine—leave name in box". The box bears a clock face on which is shown the customary departure of the Company's next limousine to Park Forest and environs. The Company has established a practice of paging at the airport and then transporting to their destination persons who leave their names in the box.

Chapter 28-19.2 prohibits solicitation of passengers for transportation in a livery vehicle. It further provides that "no passengers shall be accepted for any trip in such vehicle without previous engagement for such trip, at a fixed charge or fare, through the station or office from which said vehicle is operated".

There is no indication in Mr. Lynch's letter that the Company maintains any station or office at either airport. Rather the letter suggests that it is operated from 357 Westgate Drive, Park Forest. The letter further indicates that there is actually no engagement for any trip until the driver discovers prospective passengers' names in the described box.

Therefore, it is our opinion that this arrangement, and particularly maintenance of the described box, is in violation of the cited section of the Municipal Code.

LICENSING TAXICABS

(No. 12309—Public Vehicle License Commissioner—E. V. H.—December 17, 1959.)

Your letter of December 4, 1959, addressed to John C. Melaniphy, Corporation Counsel, has been referred to us. In it you pose nine questions relating to the issuance of taxicab licenses under the ordinance of August 24, 1959, which is to become effective January 1, 1960.

Question 1: You ask whether the present corporate holders of so-called Vet licenses are eligible for licenses under the new ordinance.

The ordinance passed August 24, 1959, to become effective January 1, 1960, providing for an increase in the number of taxicab licenses, specifies that after issuing licenses required for the operation of taxicabs pursuant to licenses issued and outstanding on the effective date of the ordinance and the number required by any licensee who surrendered licenses pursuant to the taxicab ordinance of December 22, 1937, the public vehicle license commissioner shall issue such additional licenses, within the maximum number of 4600, as are required for the operation of one taxicab by each *natural person* determined qualified therefor. By the very terms of this ordinance no corporation can qualify for any of such additional licenses. Only *natural persons* who applied for a license for the year 1958 and deposited the annual license fee therefor and who file an application for a 1960 license before February 1, 1960, may be considered for 1960 licenses. Accordingly, applications submitted by any of the corporations referred to in Question 1 cannot be considered by you.

Question 2: You state that each of two present corporate holders of so-called Vet licenses also hold an original license. You ask whether these corporations may retain the original licenses held by them.

In accordance with our answer to Question 1, the additional licenses authorized by the ordinance of August 24, 1959, may be issued only to *natural persons* determined qualified therefor. Thus, any application submitted by either of the corporations referred to in Question 2 for any of such additional licenses cannot be considered by you.

As to the original license held by each corporation as of the effective date of the aforesaid ordinance, it is our opinion that you are required to make an investigation of every applicant, as provided by Chapter 28-6 of said ordinance, to determine his fitness to become a licensee. Such investigation would include the original 3000 licensees.

Whether a license pursuant to their original license would be issued to each of the corporations referred to in Question 2 would depend upon the results of that investigation.

Question 3: You state that 13 holders of so-called Vet licenses have died since the initial decision of November 20, 1957, in the *Hafer* case, and note that, in accordance with instructions received from this office, none of these licenses have been transferred. You ask whether applications should be accepted from the estates of any of these licensees.

Under present Chapter 28-9 public passenger vehicle licenses are made personal. Therefore, upon his death a licensee's qualifications expire. Consequently, while that ordinance enables assignment, all that can be assigned is whatever right the deceased licensee may have acquired to apply for a 1960 license. Neither the deceased licensee's qualifications nor his operating record could be attributed to an assignee. Inasmuch as those factors would

seem to warrant predominant consideration in your evaluation of an applicant's fitness for license, permitting assignment and considering such assignee's application would be futile acts. Therefore, it is our opinion that no applications should be accepted from nor considered in behalf of any assignee of the deceased licensee referred to in Question 3.

Question 4: You cite the case of three individuals now holding Vet licenses which were transferred to them subject to approval of this office and yourself. You further state that none of these individuals was originally issued a license in 1946 or 1948 although each of them has a 1958 application and deposit on file. You ask whether they are eligible for licenses under the new ordinance.

The ordinance of August 24, 1959, does not require an applicant for a 1960 license to have been issued a license in 1946 or 1948. In any event, the previous ordinance permitted the assignments described, the transfers referred to in Question 4 were approved by this office, and the transferees were found qualified by your office. Therefore, it is our opinion that the individuals referred to in this question should be allowed to file applications for 1960 licenses.

Question 5: You state that a number of so-called Vet licensees have indicated an intention to attempt compliance with Chapter 28-5.1 of the new ordinance by rooming with private families or relatives in Chicago while their wives and children reside outside the city. You ask whether such an arrangement meets the requirements of the ordinance. You also state that if a licensee is legally separated from his wife you intend to require proof of that fact in verification of the legality of his residence apart from her.

Chapter 28-5 of the ordinance of August 24, 1959, requires that an application contain the Chicago business address and residence address of the applicant. Chapter 28-5.1 requires all individual applicants to be citizens of the United States residing and domiciled in Chicago. The latter section further requires any affiliate with which a licensee may be associated to be qualified to do business in Illinois and to have its principal place of business in Chicago or to be a citizen of the United States residing and domiciled in Chicago.

Those provisions constitute substantial enlargement upon the corresponding provision of the present ordinance which merely requires an applicant to file his Chicago street address. It is our understanding that the new and additional requirements were established particularly to discontinue and prohibit individual licensees' having their actual residence outside Chicago.

"Residence ordinarily means that a person has his home in a particular place. This involves the question of intent with which he is staying at that place. * * * The word resident is in common usage and is generally understood to mean one having more than a physical presence." (*Routt v. Barrett*, 346 Ill. 322; *Hughes v. Illinois Public Aid Com.*, 2 Ill. 2d 374.)

The domicile of a person is the place where he has his true fixed permanent home and principal establishment and to which whenever he is absent he has the intention of returning. (*Holt v. Hendee*, 248 Ill. 288; *Hayes v. Hayes*, 74 Ill. 312.) On the question of domicile less weight will be given to a party's declarations than to his acts (*Holt v. Hendee*, supra, citing cases).

Based on the foregoing decisions and the apparent intention of the city council in making the described additional requirements in the cited ordinances, it is our opinion that the arrangement referred to in Question 5, whereby an individual licensee would room with a private family or relative in Chicago while his wife and children resided outside the city, would not constitute the required establishment of residence and domicile in Chicago.

In the event a licensee is legally separated from his wife, it would seem advisable to require proof of such fact as evidence relating to his residence and domicile.

Question 6: You state that each of the presently operating 682 so-called Vet licensees has filed a completed questionnaire with your office and has been finger printed, on the basis of which records have been received from the FBI and the Bureau of Identification of the Chicago Police Department. You state that some of these records indicate that the present holder should not be considered for licensing under the new ordinance. You ask for suggestions in such cases.

Chapter 28-6 of the ordinance of August 24, 1959, requires that upon receipt of an application the Commissioner shall investigate the applicant's character, reputation and financial condition. Upon completion of that investigation, the Commissioner must determine that the applicant is qualified to pursue the occupation of cabman or coachman. As a consequence, every license issued by you constitutes an endorsement of the fitness of the licensee. In determining whether you are going to make such an endorsement, it is our opinion that under that ordinance it is your duty to consider all reliable information available to you, certainly including verified reports from the Bureau of Identification of the Chicago Police Department and/or the FBI.

While the fact that an individual is presently licensed indicates that, at least as of the date of the previous renewal of his license, he was deemed fit, it does not preclude evaluation of his fitness based on information previously unknown. Moreover, if you are to continue to require the highest degree of fitness among persons privileged to obtain a license from the city, it would seem that the aforesaid records must be considered in determining qualifications of the applicants referred to in Question 6.

Question 7: You state that on November 20, 1957, (the date of the initial decision in the *Hafer* case) there were still 94 so-called Veterans operating taxicabs to whom 1957 licenses have not yet been issued, that their license fees remain on deposit in your office, that they operated throughout 1958 and that the licenses of 42 of them were suspended on January 8, 1959, so that only 52 of them have operated this year. You ask whether each of these individuals and other so-called Veterans should be charged \$40 for each of the years (1957-58-59) in which they operated.

On December 30, 1958, a petition was filed before Judge Roberts seeking a contempt citation against the city for violation of the 1946 injunction against the issuance of more than 3000 taxicab licenses without giving Yellow and Checker priority right thereto. The petition alleged and the subsequent hearings established that the city in the course of permitting operation by the so-called Vet licensees had done everything but collect a license fee and issue a license to them. It was our position that all of the city's acts were done in good faith, based upon our belief that Yellow and Checker's priority rights had expired and that in accepting extensions of the contract ordinance creating such rights Yellow and Checker had waived objections to the right of these so-called Vet licensees to operate. Moreover, we informed the court that immediately upon rehearing's being denied in the *Hafer* case hearings were held by the Vehicle Commissioner preparatory to passage of a new ordinance creating an opportunity for Yellow and Checker to exercise their priority rights. The court has apparently been satisfied with these explanations, so that while Judge Roberts entered an order finding the injunction had been violated he declined to enter a finding of contempt.

The heading has been continued to April 4, 1960, at which time we expect the Judge to deny the petition.

Considering the decision in the *Hafer* case and the foregoing circumstances concerning the injunction, it is our opinion that you may charge

each of the licensees described in your question \$40 for each of the years he operated. Having accepted the privileges of using city streets for their private business in those years, these operators are estopped to attack the city's right to collect the prescribed fee therefor (*Chicago Gen. Ry. Co. v. City of Chicago*, 176 Ill. 253; *Commonwealth Edison Co. v. Rese*, 184 Ill. App. 409; *City of Peoria v. Peoria Transit Lines*, 11 Ill. 2d 520).

Question 8: You state that previously individual licensees were permitted to have a partner whose name appeared on their application and on their taxicab. You ask the legality of eliminating this practice and permitting only the name of the person to whom the license was originally issued and who has been finger printed to appear on both the application and his taxicab.

The ordinance of August 24, 1959, authorizes issuances of the additional licenses referred to therein only to natural persons who applied for licenses in 1958, deposited the fee therefor and who are otherwise found qualified. Accordingly, it is our opinion, that you are correct in eliminating the so-called partnership arrangement referred to in Question 8 and considering only applications for issuance of a license in the name of one natural person. Moreover, Chapter 28-23 permits but one name, that of the cabman or of his affiliate, to appear on the rear doors of his vehicle.

Question 9: You refer to your letter of October 18, 1957, outlining the arrangement between Public Taxi Service, Inc., and its drivers. Therein you state that Public Taxi did not own any of the 60 vehicles licensed to it—that they were purchased by the individuals who operated them and that each of these individuals had the certificate of title to his vehicle issued in the name of Public Taxi. You further state that Public Taxi charges these individuals a flat rate per month in return for certain services, payment of insurance, union dues, license fees, etc. You note that Public Taxi is eligible for 25 additional licenses under the new ordinance and ask whether the recited arrangement between Public Taxi and its drivers should be permitted to continue or whether Public Taxi should be required to purchase and own each of the vehicles for which it seeks licenses.

Chapter 28-1 of the ordinance of August 24, 1959, defines "cabman" as "a person engaged in business as the proprietor of one or more taxicabs".

Chapters 28-5 and 28-5.1 require all public passenger vehicle licensees to be persons residing and domiciled in Chicago or qualified to do business under the laws of Illinois and having their principal place of business in Chicago.

Chapter 28-9 makes it "unlawful for any cabman * * * to lease or loan his public passenger vehicle or to contract for the independent operation thereof by any affiliate * * * or to contract with any affiliate for management of the cabman's * * * operation for any consideration other than the payment of a stipulated cost of service charge to such affiliate". This section of the ordinance also defines the relationship between the licensee and the driver of a public passenger vehicle as that of employer and employee.

Chapter 28-12 requires every cabman to carry specified insurance for himself and his employees to secure payment for any loss or damage resulting from use or operation of the cabman's public passenger vehicle.

Chapter 28-12.1 requires the affiliate of any cabman to provide specified insurance covering such affiliate and his affiliated cabmen and their public passenger vehicles in lieu of the insurance required of a cabman pursuant to Chapter 28-12.

Chapter 28-13.1 requires cancellation of an affiliate's registration and suspension of a cabman's license if his affiliate denies liability on the ground it was not the owner or operator of the public passenger vehicle involved in litigation.

Chapters 28-16 and 28-25 require a cabman to deliver or submit his public passenger vehicle for inspection or other duty upon demand of the vehicle commissioner.

Chapter 28-23 requires every public passenger vehicle to have the cabman's name printed on its rear doors.

Chapter 28-30.1 requires every cabman and affiliate to keep books and records of his operations and to submit an annual statement thereof to the vehicle commissioner.

It is our opinion that the cited sections of the new ordinance specify and demonstrate the intent to require that the licensee of a public passenger vehicle be the unconditional owner thereof, regardless of whether he is its purchaser.

The arrangement you described between Public Taxi and the purchasers of vehicles now licensed to it, does not indicate whether such purchasers have any right, by formal agreement or otherwise, to recover from Public Taxi ownership of the vehicles purchased by them. If not, and if on its application Public Taxi declares unconditional ownership of the vehicles for which it seeks licenses and if your investigation should verify such declaration, then licenses may be issued to Public Taxi. However, if there exists any procedures whereby such purchasers may recover ownership of their vehicles from Public Taxi, that arrangement would amount to a violation of the ordinance, particularly Chapter 28-9 thereof. In such instance, no license for any such vehicle should be issued to Public Taxi. Thus, whether any license is to be issued to Public Taxi would depend on the declaration in its application and results of your investigation as to unconditional ownership of the vehicles for which it seeks to obtain licenses.

TAXICAB INDENTITY MARKINGS

(No. 12313—Public Vehicle License Commissioner—E. V. H.—January 12, 1960.)

Your letter of January 7, 1960, addressed to John C. Melaniphy, Corporation Counsel, has been referred to us. Therein you request clarification of the provision of Chapter 28-23 of the Municipal Code pertaining to identification of taxicabs. You specifically ask:

- (1) what identification is to be permitted on taxicabs belonging to members of a taxicab association;
- (2) whether any telephone number or other wording is to be permitted on the front doors and/or the trunk lid of taxicabs;
- (3) whether a licensee who is not a member of any taxicab association may place the word "taxi" on the rear doors of his taxicab in substitution for his home telephone number?

Chapter 28-23 requires that "Every taxicab shall have the public passenger vehicle licensee number and the cabman's name and telephone number painted in the center of the main panel of the rear doors of said vehicle. If the cabman is affiliated or identified with any person * * * the affiliate's color scheme, trade name or emblem and telephone number shall be substituted and, without being limited thereto, any of said indicia of affiliation shall be sufficient to establish the responsibility of the affiliate in the operation of said taxicab. * * * No other name, number, emblem or advertisement of any kind excepting signs required by this chapter, official license emblems or plates shall be painted or carried so as to be visible on the outside of any taxicab".

We understand that the intent of the present ordinance is to establish the primary responsibility and liability of the organization with which a licensee may be affiliated. Thus, the cited section minimizes the significance of an affiliated licensee's name and yet affords protection to the public. Therefore, it is our opinion that under the present ordinance the cab of an affiliated licensee may contain only the cabman's public passenger vehicle license number and his affiliate's color scheme, trade name, emblem and telephone number. (We understand that the trade name and emblem are essentially interrelated. Moreover, it is our opinion that in the cited ordinance the word "or" is used as a conjunction enabling the use of both trade name and trade emblem.)

The permitted wording should be placed only in the center of the main panel of the rear doors of such vehicle.

The last sentence of the cited ordinance prohibiting any additional designations on taxicabs has been repeated verbatim from the corresponding section of the previous ordinance. Reference has been made to an opinion of this office dated April 5, 1950, permitting use of the descriptive phrase "Radio Dispatched" on certain taxicabs. However, that opinion was based upon an ordinance which did not contain the prohibitory language specified above. Accordingly, that opinion is not applicable under the present ordinance, which, in our opinion, precludes the placing of any additional letters and/or numbers on other than the center panel of the rear doors of taxicabs.

Our opinion would prevent an individual licensee who is not a member of a taxicab association from placing any wording on his taxicab other than his public passenger vehicle license number, name and telephone number. It will also make uniform the external appearance of all public passenger vehicles.

SCHOOL BUS STATION WAGON

(No. 12341—Public Vehicle License Commissioner—E. W. P.—May 20, 1960.)

We have your recent communication requesting us to furnish an opinion as to whether or not a station wagon or carry-all may be used as a school vehicle for the conveyance of children under the provisions of the Municipal Code. Sections 28-4 and 28-4.1 provide as follows:

"28-4. No vehicle shall be licensed as a public passenger vehicle until it has been inspected under the direction of the commissioner and found to be in safe operating condition and to have adequate body and seating facilities which are clean and in good repair for the comfort and convenience of passengers. (Passed. Coun. J. 12-20-51, p. 1596; amend. 12-30-52, p. 3905.)"

"28-4.1. No vehicle shall be licensed as a livery vehicle or taxicab unless it has two doors on each side, and no vehicle having seating capacity for more than seven passengers shall be licensed as a public passenger vehicle unless it has at least three doors on each side or fixed aisle space for passage to doors. (Passed Coun. J. 12-30-52, p. 3905.)"

Section 28-4 refers to public passenger vehicle and the first part of Section 28-4.1 describes a livery vehicle or taxicab. A livery vehicle is defined in the ordinance as meaning a public passenger vehicle for hire at a charge or fare for each passenger. However, the entire subject of these two sections is relative to safety and the seating capacity in Section 28-4.1 for a city vehicle having more than seven passengers requires at least three doors on each side or a fixed aisle space for passage to doors.

It is our opinion that the intent of these sections requires at least two doors on each side of the vehicle in order that the vehicle may be qualified as a school vehicle or bus. We agree with you that the dangers are the same or even greater with reference to the conveyance of the school children.

SCHOOL BUS DOOR REQUIREMENTS

(No. 12353—P. P.—E. W. P.—August 22, 1960.)

This will acknowledge receipt of your letter of July 29, 1960 in which you enclose a descriptive booklet illustrating the vehicle known as the "Camper" Volkswagon Station Wagon, which you advise is eminently suited for school use. You state that they are well and sturdily constructed, have exceptional visibility, are roomy and well ventilated and heated, have a safe maximum speed and are designed to afford superior safe and ready ingress and egress (through double doors) for the passengers.

You mention other features which you state are very desirable and you advise that these wagons ideally meet the requirements of Section 28.2-6 and afford safe and comfortable transportation of school children.

In our opinion of July 6, 1960, addressed to Honorable William P. Flynn, Commissioner, Public Vehicle License Commission, we took the position that the school vehicle should have four doors, two doors on each side of the vehicle so as to meet standards imposed in Section 28-4.1 relating to the licensing of public passenger vehicles. Your vehicle provides a double door on the one side of the vehicle, but provides no ingress or egress on the other side for the passenger.

You stated in your letter of July 29 that in your opinion Section 28-4.1 is not applicable to school vehicles, that Chapter 28.2 and Chapter 28-4 are entirely independent of each other, and that no section may or should be read into the other.

Chapter 28.2 which deals with the requirements for school vehicles contains two sections which particularly emphasize the requirements for safety. Section 28.2-6 gives the Public Vehicle License Commissioner the right to determine the capability of each vehicle *under conditions* which will provide each child with adequate seating space to enable him or her to ride in comfort and safety, and Section 28.2-8 provides that all doors to the rear of the driver's seat shall be equipped with safety device or devices to make impossible their opening from the inside by the children and that there must be a clear aisle leading from all seats to *regular exit doors*. (Italics supplied.)

It is true that the school vehicle ordinance does not state the number of doors in figures; however, it does indicate by its language that there should be a plural number of doors to the rear of the driver's seat and it does further permit the Commissioner to prescribe the conditions to insure the safety of each child.

It appears from the reading of the specifications required by the City Council in Section 28-4.1 relating to public passenger vehicles that two doors on each side are required with fixed aisle space for access to said doors. Certainly, if this requirement is a mandate for livery vehicles, sightseeing vehicles, taxicabs and terminal vehicles, the requirements for safety including the number of doors for school vehicles should contain at least the same high standards.

Section 1-19 of the Municipal Code provides that all general provisions, terms, phrases, and expressions contained in this Code shall be liberally construed in order that the true intent and meaning of the City Council may be fully carried out.

F. OTHER LICENSES AND PERMITS

EXEMPTION FROM ELEVATOR INSPECTION FEE

(No. 11780—Commissioner of Buildings—M. I. W.—December 16, 1953.)

In your letter of October 30th, you state that you have made periodic inspections of a passenger elevator and dumbwaiter installed in 1950 at 400 East Ontario, which inspections have been paid for through January 1953. You further state that the inspection of July 2, 1953 has not been paid for and you enclose a letter from the American Institute of Baking which states that a Council Order, introduced by Alderman Crowe on September 28, (see Council Journal September 28, 1953, page 5757) exempts them from payment of fees for inspection of elevators.

You request our opinion as to this matter. Our investigation shows that the American Institute of Baking is organized as an Illinois not-for-profit corporation. The principal activity carried on at the premises is "The School of Baking" to which approximately three-fourths of the premises are devoted. This school is conducted pursuant to the purposes of this organization which are described in the by-laws thereof, one of which reads in part as follows:

"* * * to promote the cause of education, in nutrition and in the science and art of baking, for the advancement of the welfare of mankind, and to this end among other things, to disseminate information and to establish, maintain, and conduct a school or schools."

The facilities on the premises consist of class rooms, student laboratories, a fully equipped model baking shop providing practical experience, a student lounge, a library and administrative offices.

Courses are presented in baking science and technology, production problems, equipment maintenance and bakery sanitation among others.

The school has a history of approval by the state authorities for purposes of the so called "G. I. bill".

The remaining portion of the premises not devoted to actual instruction are used for laboratory research on projects that may be of practical aid to the baking industry including bacteriological research and nutritional studies. Projects undertaken are passed upon by a scientific advisory committee and although research may be sponsored by individual companies, the Institute refrains from accepting grants that would involve the development of a product or a process for the sole use of an individual company.

It is therefore our opinion that the American Institute of Baking is an educational institution conducted not for profit.

The Municipal Code provides that educational, charitable and religious institutions shall be granted exemptions from the payment of certain inspection fees. There is no general exemption from all such fees found in the code, but rather exemptions are specifically provided for in the portion of the code dealing with a specific fee.

Thus the Municipal Code provides among others, for an exemption from the boiler inspection fee (section 84-9.3), refrigerating system inspec-

tion fee (section 85-71.3), and the annual inspection of buildings fee (section 46-7). This latter is of particular interest in that it appears in the same chapter of the code wherein is found provisions for fees for other types of inspections including that for elevators (section 46-11). However, none of these other sections, including section 46-11, contain a similar exemption. The language of section 46-7 reads in part as follows:

*"The inspection fee required by this chapter for the annual inspection of buildings, shall not be charged against any charitable, religious, and educational institutions * * *" (emphasis added.)*

This exemption is thus expressly limited to the "fee required by this chapter for the annual inspection of buildings" and its provisions do not extend to the other fees provided for in the same chapter. No exemption from elevator fees is found.

We come now to a consideration of the effect of the council order introduced by Alderman Crowe.

In an opinion dated November 24, 1931, 18 Op. Corp. Coun., 87, (No. 7320) we said:

"This department has gone on record many times on similar questions, always holding that an ordinance cannot be avoided by the passage of an order directing the contrary. On the other hand, council orders authorizing permits without fees for religious organizations, etc., have frequently been observed even though they are contrary to the ordinance. Our recommendation is that such acts of the city council should be disregarded when in the form of orders, because an ordinance should not be overridden unless the enactment for that purpose is an act of equal dignity—that is to say, an ordinance."

In a letter dated December 7, 1953, we advised Alderman Crowe to this effect and suggested that he introduce an ordinance covering this same subject, pending our final opinion on this matter.

There remains the problem of whether, even if in ordinance form, the City Council may provide for exemptions for charitable, religious and educational institutions, on a piecemeal, institution by institution basis by special ordinances rather than by a general ordinance creating exemptions from said fees for all charitable institutions similarly situated.

Special ordinances passed at almost each city council meeting, attest that the practice of using special ordinances for this purpose has become routine.

In an opinion dated November 13, 1931, we stated that the only limitation upon the power of the city council to pass local or special laws, is that such special laws must be reasonable. Classifications based on natural distinctions, were said to be valid, while those which are purely arbitrary were said to be invalid. 18 Op. Corp. Coun. 86 (No. 7295).

Applying this rule, there would appear to be no reasonable justification for passing an ordinance granting an exemption to one charitable institution, which does not by its terms extend to all charitable institutions similarly situated.

The answer to this objection is, of course, that the actual practice is to grant the exemption to all institutions similarly situated as they may request the exemption and their request is introduced by an alderman in ordinance form.

We are therefore not prepared to say that such a special ordinance is invalid, but do suggest that a general ordinance is more appropriate, imposes less of a burden upon the council and its committees, and announces to all what the policy of the City is through ordinances that all may see.

In summation, it is our opinion that (1) the American Baking Institute is an educational institution conducted not for profit and is entitled to all exemptions provided for such institutions in the Municipal Code. (2) Where no exemption is provided from a fee exacted under a provision of the Code, a council order is not an appropriate means to modify the fee requirement. (3) There is no express exemption in the Code from fees for elevator inspections and such exemptions must be created by ordinance. (4) A special ordinance to that effect, covering individual institutions is not clearly invalid and should, in view of the existing custom, be honored, but (5) a general ordinance covering all charitable institutions at one time would be more appropriate.

PARKING AREA ON ROOF OF GARAGE

(No. 11790—City Collector—M. I. W.—February 22, 1954.)

We have your communication of October 5, in which you transmit the contents of a letter dated October 3, received by you from the Chicago Service Parking Company, 139 N. Clark Street, regarding their garage at 22-36 E. Randolph Street, which reads as follows:

"We are in receipt of a notice that our garage at 22-36 E. Randolph St. has been partially reclassified as a parking lot for licensing purposes. Because of this we are asked to pay an additional \$350.50 license fee. I understand the roof area is being classified as a parking lot.

"This garage was built in 1940 and has always been licensed Class 1. Years ago when a distinction was made between garages and parking lots and the license fees on parking lots were increased, it was based on the fact that garages paid many inspection fees that did not apply to parking lots. Also that garages paid additional real estate taxes.

"Our garage pays all the inspection fees chargeable against garages. We pay a very substantial real estate tax on the building. The cost of preparing the roof for parking approximates the cost of the other floors. Other garages have been served with similar notices of partial reclassification. We believe that this is erroneous, unfair and contrary to the law."

You request our opinion on this matter.

Section 156-17 of the Municipal Code of Chicago divides public garages into two classes for the purpose of licensing. Class I is defined therein as including "all public garages enclosed within garage building." The fee for this class is set at \$40.00 for the first twenty-five vehicles and \$1.65 for space for each additional vehicle. Class II includes "all public garages not enclosed within a building having four walls and a roof extending from wall to wall and covering the entire space enclosed by such walls." The fee for this class is set at \$150.00 where the capacity does not exceed 25 cars and an additional \$5.00 per car for space in excess thereof.

Our study of the ordinance leads us to believe that the classification of enclosed and unenclosed garages and the fees charged in connection with the issuance of licenses was undoubtedly based on the considerations suggested in your correspondents' letter.

The setting of a lesser fee schedule for enclosed garages seems to reflect the city council's recognition that a proper share of the burden of regulation is contributed to by Class I garages through the payment of other fees. To hold that a garage making use of its roof as an additional facility, supplementing the principal use of the enclosed portion of the

structure, must procure an additional license as if it were a separate enterprise and on a Class II fee basis would, in our opinion, constitute an application of the provisions of the ordinance which the city council did not foresee and would do violence to the intention of the council as implied in the ordinance.

It is, therefore, our opinion that use of a roof for the parking of cars supplementing principal use of an enclosed garage should not result in the roof facilities being reclassified as Class II garages for licensing purposes.

RAISING DOGS

(No. 11796—C. N.—March 22, 1954.)

We have your letter of March 17, 1954, addressed to our Mr. John C. Melaniphy, First Assistant Corporation Counsel, in which you ask if a person raising dogs, three to ten in number, in the basement of his home, as a hobby and not as a regular business, is required to have a license of any kind.

Section 98-27 of the Municipal Code of Chicago sets forth that "It shall be unlawful for any person to own or keep a dog unless he shall procure a license therefor."

Section 105-1 of the said Code reads:

"No person shall engage in the business of buying, selling or dealing in birds, dogs, or other small animals used as household pets or used for domestic purposes, without first obtaining a license."

Section 105-5 of the said Code is as follows:

"It shall be the duty of every person licensed to engage in the business of dealing in birds, dogs, or other small animals used as household pets or for domestic purposes to comply with provisions of this code regulating health and sanitation applicable thereto.

"The commissioner of buildings shall periodically inspect each such place of business to determine whether the applicable provisions of this code regulating health and sanitation are being complied with."

Section 105-5 states:

"The term 'dog kennel' is hereby defined to mean any establishment or premises wherein or whereon dogs are kept for the purpose of breeding, boarding, sale, exchange, or sporting."

Section 105-7:

"No person shall engage in the business of operating a dog kennel * * * without first having obtained a license thereof."

Careful examination of the sections hereinabove quoted, particularly Section 105-6 warrants the conclusion that your client is operating a dog kennel in the basement of his home. Therefore, a license is required.

LICENSE FOR VENDING MACHINE AT ARMY DEPOT

(No. 11845—City Collector—M. C. H.—September 1, 1954.)

This is to acknowledge the receipt of your letter of July 30, 1954 in which inquiry is made as to whether or not the cigarette vending machines you found in building occupied by the Chicago Quartermaster's Depot of the United States Army at 1809 to 1859 W. Pershing Road are subject to Retail Tobacco Dealer's License; also, if a Certificate of Registration for

Cigarette Vending Machines is necessary and whether or not the Cigarette Tax Stamp is necessary.

The answer to your inquiry in said letter is found in Title 4, USCA, Section 13, now incorporated in Revised Title 4 USCA as Sections 105 and 107. Section 105 provides as follows:

"(a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to sales or purchases made, receipts from sales received, or storage or use occurring, after December 31, 1940. July 30, 1947, C. 389, § 1, 61 Stat. 641."

Exceptions to said provisions in Section 105 are found in Section 107, subsections (a) and (b), which provide as follows:

"(a) The provisions of sections 105 and 106 of this title shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser.

(b) A person shall be deemed to be an authorized purchaser under this section only with respect to purchases which he is permitted to make from commissaries, ship's stores, or voluntary unincorporated organizations of Army or Navy personnel, under regulations promulgated by the Secretary of War or the Secretary of the Navy. July 30, 1947, c. 389, § 1, 61 Stat. 641."

It is safe to assume that under the provisions stated above the state and city tax laws could not be enforced against the activities of the Army Post Exchange in the sale of cigarettes and tobacco on said premises.

In an action brought by the United States, and a commanding General and Post Exchange Officer of Fort Jackson, South Carolina, for a declaratory judgment and to enjoin the members of the South Carolina Tax Commission from enforcing the provisions of the Tax Act of the State of South Carolina against the United States Army Post Exchange at Fort Jackson, *United States, et al. v. Query, et al.*, 37 Fed. Supp. 972, the Court at p. 975 said:

"We are of the opinion that the provisions of the state statute are not applicable to the activities of the Post Exchange, that the federal act does not give to the defendants the power to enforce such provisions against such activities, and that the order of the defendants to enforce the provisions of the state statute against such activities and their threat to enforce and their attempt to enforce the same constitute an interference with the activities of the United States, and are unconstitutional."

In the case of *Falls City Brewing Co. v. Reeves, et al.*, 40 Fed. Supp. 35, the court at p. 40 said:

"The Court is accordingly of the opinion that the Post Exchange at Fort Knox, Kentucky, is a federal instrumentality within the purview of the exemption clause of the Buck Resolution, being section 3 of the House

Resolution 6687; that neither the defendant Captain Robert Stevenson, nor the defendant Post Exchange is required to purchase a license from the Commonwealth of Kentucky authorizing them or either of them to engage in the business of selling malt beverages, and that the Commonwealth of Kentucky is without right to levy or to impose its regulatory statutory provisions, on the sale of malt beverages sold by the plaintiff Falls City Brewing Company to the Post Exchange at Fort Knox, Kentucky, for resale to the authorized purchasers from that organization."

However, one who for gain contracts with the federal government does not thereby become an instrumentality of the federal government, and his right to do business within the state in which the contract is performed is not immune from taxation by such state.

In the case of *Union Pacific Railroad Co. v. Peniston*, 18 Wall. 5, 33, 36, 21 L. Ed. 787, 792, 793, the Court said:

"It may, therefore, be considered as settled that no constitutional implications prohibit a State tax upon the property of an agent of the government merely because it is the property of such an agent. A contrary doctrine would greatly embarrass the States in the collection of their necessary revenue without any corresponding advantage to the United States. A very large proportion of the property within the States is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops, and munitions of war are carried upon almost every railroad. Telegraph lines are employed in the national service. So are steamboats, horses, stage-coaches, foundries, shipyards, and multitudes of manufacturing establishments. They are the property of natural persons, or of corporations, who are instruments or agents of the General government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to the revenue of the States it is manifest the State government would be paralyzed. While it is of the utmost importance that all the powers vested by the Constitution of the United States in the General government should be preserved in full efficiency, and while recent events have called for the most unembarrassed exercise of many of those powers, it has never been decided that State taxation of such property is impliedly prohibited * * *.

It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect."

The same rule of law was upheld in the case of *Ernest E. James v. Dravo Contracting Co.*, 302 U. S. 134.

In the event that the Cigarette Vending Machines found in the Quartermaster's Depot of the United States Army, at 1801 to 1859 W. Pershing Road, are operated and controlled by a private person or corporation under a concession lease the city and state tax laws may be enforced; but if these cigarette vending machines are owned and operated by the United States Government city and state taxes are not applicable.

LICENSE FOR CITY PARKING FACILITY

(No. 11859—City Collector—A. F. G.—October 7, 1954.)

We have your letter of October 6, 1954 which is as follows:

"The creation of the parking facilities recently authorized by the City Council makes it necessary for this office to establish a policy with respect to the licensing of such facilities.

The question presented is whether or not these parking facilities by reason of their present method of organization and business management are subject to the provisions of Section 156-13 of the Municipal Code of Chicago governing the licensing of public garages.

Inasmuch as the first of these parking establishments is scheduled to open on October 8th, it is apparent that the policy of this office must be formulated in the next few days, and any action to be taken by this office must be planned quickly.

Under the circumstances, I should like your opinion on this matter as quickly as possible."

On the 4th day of October, 1954, the City of Chicago entered into an Operators' Agreement with Downtown Parking Stations, Inc. for the operation of the city-owned Facility No. 8 located at N. LaSalle street north of W. Washington street. The first paragraph of this agreement contains this provision: "The Operator shall pay all fees, licenses, taxes and charges assessed under local, State and Federal statutes or ordinances, insofar as they are applicable".

Under this plainly worded covenant on the part of the Operator to pay all license fees assessed under the ordinances of the City, it should be your policy to collect the fees provided in Section 156-13 of the Municipal Code of Chicago.

As new facilities are made available and new operating agreements are entered into with respect to them, no set policy can be formulated until the terms of the agreements are known, and your policy should be guided by the terms of such agreements.

WIDENING OUTDOOR THEATRE SCREEN

(No. 11867—Commissioner of Buildings—E. W. P.—November 16, 1954.)

We have your letter of November 10, 1954, relative to the processing of an application for a permit to widen the screen in the Double Drive-In Theatre to provide for cinemascope projection. In your letter you request our opinion as to whether or not a permit may be issued for this additional construction.

We note that Mr. Philip R. Toomin, representing the Double Drive-In Theatre, advises in his letter dated October 29, 1954, addressed to you, that the reason given by your department for refusing the application was because of an alleged violation of Section 12 of the Chicago Zoning Ordinance.

The judgment order entered by Judge Cornelius J. Harrington in the Circuit Court on March 3, 1953, which judgment order was not appealed and which was predicated upon a prior order entered January 20, 1950, adjudged that a double drive-in theatre could be operated without reference to the Chicago Zoning Ordinance, and that while Chapter 55.1 relative to open-air drive-in theatres is a valid and legal ordinance, that said Chapter 55.1 when applied to the premises here involved is illegal and void only as to such premises, but not otherwise.

It is, therefore, our opinion that you should proceed to process the application for the permit to widen the screen in the above theatre property without reference to the Chicago Zoning Ordinance, or Chapter 55.1 of the Municipal Code, and provided the plans and specifications are in compliance with the Building Code except for the provisions of 55.1, that you should issue the permit.

We are returning Mr. Toomin's letter, addressed to you, and also the certified copy of the judgment order in case No. 49-C-12320.

LICENSE FOR OUT-OF-CITY BAKERY TRUCK

(No. 11877—City Collector—M. C. H.—December 15, 1954.)

This is to acknowledge your letter to this office dated October 19, 1954 in which you request us to determine which provision of Section 107-5 of the Municipal Code of Chicago is applicable to a wholesale bakery not licensed to do business in the City of Chicago but licensed by another municipality making regular deliveries in the City of Chicago.

Section 107-5 provides in part as follows:

"107-5. The annual license fee for each wholesale bakery is hereby fixed at one hundred dollars for each establishment, and ten dollars in addition thereto for each vehicle operated for the delivery of bakery products. Itinerant venders of bakery products at wholesale operating independently of any *licensed bakery* shall pay an annual license fee of thirty dollars for each vehicle operated." (Emphasis supplied.)

It is urged by representatives of a wholesale bakery operating as described above that they fall within the provisions setting a \$10 fee for each vehicle because they "do not operate independently of a licensed bakery" inasmuch as they are licensed by the municipality in which they are now located.

Your view has been that the word "license" as used in the ordinance refers to licensing by the City of Chicago and, therefore, since no such license has been issued for the establishment the provisions of Section 107-5 setting a fee of \$30 per vehicle is applicable.

It is our opinion that your view as stated above is the correct interpretation of the ordinance. We do not believe that the City Council intended to have the word "license" construed to mean any license issued by any authority other than our own. The purpose of this ordinance is to set a standard of sanitation. An automatic acceptance of standards adopted by other authorities would defeat the basic purpose of this ordinance. The right of the city to make such a classification is well settled.

In the case of *Jewel Tea Company, Inc. v. City of Troy, Illinois, et al.*, 80 Fed. 2d p. 366, at p. 368, the court said:

"(5) It is contended that the ordinance transgresses the Fourteenth Amendment to the Federal Constitution in denying to appellant

the equal protection of the law. This contention is predicated upon the fact that the ordinance excepts from its requirement to pay a license fee those who have places of business licensed and inspected as food dealing establishments within the city, and who under another ordinance are required to pay a license of five dollars per annum, such ordinance also making provision for inspection and regulation. We are satisfied that vehicle owners delivering foodstuffs in the city and having no habitat therein are, for the purposes of such ordinances, in a class separate and apart from those who have therein permanent places of business. The fact alone that agents of concerns such as appellant, who in delivering the goods drive about the city, and whose vehicles may be inspected only when and as the city officials can find them, makes the work of their proper inspection more burdensome and costly than where the vehicles are connected with an established business within the city and reachable at almost any time. We think that this alone furnishes reasonable basis for classification, and supports the higher fee for vehicles such as those of appellant. *State Board of Tax Com'rs. v. Jackson*, 283 U. S. 527, 51 S. Ct. 540, 75 L. Ed. 1248, 73 A. L. R. 1464; *Middleton v. Texas Power & Light Co.*, 249 U. S. 152, 30 S. Ct. 227, 63 L. Ed. 527."

See also *The American Baking Company, et al., Appellants v. The City of Wilmington, et al., Appellees*, 370 Ill. 400; *City of Chicago v. R & X Restaurant*, 369 Ill. 65 and *Keig Stevens Baking Company, et al. Appellants v. City of Savannah, et al., Appellees*, 380 Ill. 303.

In view of the foregoing we are of the opinion that the owners of the delivery trucks delivering bakery products in the City of Chicago from a wholesale bakery not licensed to do business in the City of Chicago should be classified as itinerant vendors under Section 107-5 and a license fee of \$30 be charged for each vehicle selling or delivering bakery products within the city limits of the City of Chicago.

FEE EXEMPTION FOR HOSPITAL

(No. 11885—Permits and Inspection Liaison Office—M. I. W.—February 28, 1955.)

In your letter of January 20th, you state that the Michael Reese Hospital is allegedly indebted to the City of Chicago in the amount of \$681.00 for elevator inspections made during the years 1952, 1953 and 1954. You state that the hospital claims exemption from the payment of such fees under an ordinance passed by the City Council on May 21, 1952, and you request our opinion as to the effect of this ordinance on the obligations of the hospital. The ordinance in question provides in part as follows:

"Section 1. That the Commissioner of Buildings, the Commissioner of Public Works, the Commissioner of Streets and Electricity, the President of the Board of Health and the City Collector be and they are hereby directed to issue *all necessary permits and licenses free of charge*, notwithstanding other ordinances of the City of Chicago to the contrary, to Michael Reese Hospital of Chicago * * * for the *erection and maintenance* of hospital buildings * * * Council Journal, May 21, 1953, page 2467."

This ordinance clearly exempts the hospital from the payment of the fees referred to. The City Council has upon occasion sought to exempt certain institutions from fees set by ordinance through the passage of a council order. We have repeatedly held that a council order was an inappropriate and ineffective means of modifying the provisions of a properly enacted

ordinance since an action of lesser formality could not override the provisions of an act of greater dignity. The exemption provided for here being in the form of an ordinance is not subject to this objection.

We have likewise from time to time advised the City Council that it would be better form to enact a general exemption for all institutions falling within a similar class so as to lessen the possibility of a challenge made as to the validity of the exemption on the grounds that it constituted special legislation. The council has not as yet seen fit to enact such an ordinance and has continued the practice of providing for exemptions of this type institution by institution.

Not being prepared to state that individual exemptions so granted are without validity, we advise that you regard this ordinance as properly exempting this hospital from the fees involved.

FUEL TANKS AT MIDWAY AIRPORT

(No. 11895—City Collector—A. F. G.—April 18, 1955.)

We have your letter of January 31, 1955 re installation by the United Air Lines of a 10,000 gallon pressure tank for the storage and distribution of flammable liquids at 5840 S. Cicero Avenue, which is Midway Airport. Your letter was accompanied by a letter from United Air Lines dated December 9, 1954, explaining the installation.

From the two letters these facts appear. The United Air Lines have a gasoline storage system of 259,000 gallons capacity located on the east side of S. Cicero Avenue in the 5900 block, directly opposite Midway Airport, for which they pay the license fees required by Chapter 129.1 of the Municipal Code of Chicago. These storage tanks are connected by pipe lines with the gasoline lines and pits maintained on the airport grounds and for the installation and maintenance of which the company pays \$600.00 a year. The Company pays compensation to the City for the space occupied by these pipe lines under S. Cicero and S. Keating Avenues. We are advised that the new pressure or booster tank has been installed for the purpose of facilitating the distribution of gasoline, rather than as an additional storage unit.

The storage tanks on the east side of Cicero Avenue, the gasoline lines and pits in the airport grounds on the west side of said street and the pipes under the streets connecting these units are an integrated and unified system owned by one company for the single purpose of supplying gasoline to aircraft using the airport, and in our opinion constitute a single premise. We do not believe that the location of the new pressure tank at a street number different from that marking the location of the main storage tanks changes the single character of the premises.

The fact that the single premises bears different street numbers would not in our opinion make it a separate "location, place or premise" within the meaning of Section 129.1-1 of the Code.

Section 129.1-1 of the code is in part as follows:

"No person shall keep on hand or store for use in any business any flammable liquid having a flash point below 187° Fahrenheit or 86° Centigrade (closed cup tester) without first procuring a license so to do for each location, place or premise where such person keeps on hand or stores for use any such flammable liquid. * * *"

If the Airlines elected to place the 10,000 gallon booster tank in that part of their premises at 5949 Cicero Avenue, you would not charge more

than the small fee provided for additional installations, but because they decided for more efficient operation to place it in another part of their premises at 5840 Cicero Avenue that fact would not warrant you in charging the larger fee provided for installations on separate premises. As pointed out above it is our opinion that the operation of the airport by the United Lines is a single unified business, carried on by one company on a single premise and the new tank installed is subject only to the small fee provided for in such cases.

DESTRUCTION AND STORAGE OF LICENSE RECORDS

(No. 11908—City Clerk—A. F. G.—May 24, 1955.)

We have your letter of May 3, 1955 which reads as follows:

"Due to lack of space required for the storage of General, Vehicle and Dog license records, I am contemplating renting additional space in a privately owned warehouse.

Kindly render an opinion as to how long I am required by statute to keep the above mentioned records and also if it permissible for me to store records in a privately owned warehouse."

In 1947 Section 9-69.1 was added to the "Revised Cities and Villages Act". The section applies only to the city clerk of Chicago and authorizes him to destroy records in his possession or control relating to licenses twenty years or more after their expiration. The section reads as follows:

"Section 9-69.1. Records-Disposition.)

The Clerk of each municipality having a population of more than 500,000 is authorized to destroy or otherwise dispose of all records in his possession or control relating to licenses twenty years or more after their expiration."

At the 1951 session of the General Assembly an Act was passed which authorizes municipalities to microfilm records and destroy original records after the same have been microfilmed. It was in the form of an amendment to an Act which permitted the microfilming of records of counties and courts (Paragraphs 31 to 34, incl. Chapter 116 Ill. Rev. Stats. 1951).

"Section 1 of the said Act is as follows:

'Any elected or appointed officer of any county, municipal corporation or political subdivision of the State of Illinois or the clerk of any court may cause any or all public records, papers or documents in his custody or under his supervision to be photographed, microphotographed or otherwise reproduced on film. The film shall comply with the minimum standards of quality approved for permanent photographic records by the National Bureau of Standards and the device used to reproduce the records on the film shall be one which accurately reproduced the content of the original.'

Section 4 of the Act provides the manner of submitting lists of records to be filmed to the city council for approval and is as follows:

'Any such officer or clerk of court before causing any records, papers or documents to be photographed, microphotographed or reproduced on film, as provided in Section 1 hereof, shall file with the county board of his county or with the city council, board of trustees or other governing body of the municipal corporation or

political subdivision, as the case may be, a statement signed by him, listing the records, papers and documents he desires to cause to be so photographed, microphotographed or otherwise reproduced on film and stating that, subject to the prior approval of the county board, or the city council or board of trustees or other governing body of the municipal corporation or political subdivision, as the case may be, he proposes to cause the records, papers and documents so listed to be reproduced on film and subsequently destroyed. A copy of such statement shall be posted, in a public place in the office of the county, city or village clerk, or in the office of the governing body of the municipal corporation or political subdivision, as the case may be, and in the office of the officer or clerk of court signing such statement. The county board, or the city council or board of trustees or other governing body of the municipal corporation or political subdivision, as the case may be, at any regular or special meeting held not less than thirty days after the filing and posting of such statement, shall consider said proposal and any objections thereto and may authorize the officer or clerk of court signing such statement to cause any of the records, papers and documents listed in the statement to be photographed, microphotographed or otherwise reproduced on film and to cause such records, papers and documents when so reproduced on film to be destroyed in accordance with the provisions of Section 3 hereof.'

Section 3 of the Act, and with which the destruction of records must accord as provided in section 4, is in part as follows:

'Whenever such reproductions are placed in conveniently accessible files and provision is made for preserving, examining and using the same, any such officer may authorize or provide for the destruction of his original records, papers or documents which have been on file for ten years. Original records, papers or documents created prior to 1870 may not be destroyed. * * *'

After a study of these two Acts it is our opinion that you may destroy records relating to licenses more than twenty years after their expiration without microfilming the same, under the Act relating only to your office; however records relating to licenses more than ten years old and less than twenty years old, as well as all records and documents in your possession more than ten years old, can only be destroyed after microfilming in the manner provided in the Act of 1951 above quoted.

We do not believe you have authority to rent on behalf of the City additional space in a privately owned warehouse without an ordinance expressly authorizing you to do so.

Section 7-50 of the Municipal Code of Chicago provides in part as follows:

'The comptroller is authorized to execute real estate leases on behalf of the city as lessor or lessee for a term of not more than two years subject to the approval of the city council. * * *'

An order of the city council directing you to lease private property for the storage of records would not be effective as it has been repeatedly held that an ordinance cannot be amended by a mere order or resolution and such an order would amount to an amendment of the foregoing ordinance.

When authorized by ordinance, we see no legal objection to storing records of your office in a separate room or compartment of a privately owned warehouse when no storage space is available in city controlled property. Such room should be reasonably safe from fire and theft and be accessible only to you or your authorized agents.

CIGARETTE DEALERS LICENSE APPLICATION

(No. 11919—City Collector—E. E. M.—June 30, 1955.)

This is to acknowledge your letter of June 29, 1955.

In that letter you request an opinion as to whether the City Collector's office can refuse to accept applications for retail tobacco dealer's licenses made by the DeLuxe Cigarette Service Company or to any other person, firm, or corporation for any location in the City of Chicago.

Provisions of the Municipal Code of Chicago relating to licenses for retail tobacco dealers are found in Chapter 178. This office found no provision in this Chapter which would permit your office to refuse to accept applications for licenses made by any firm, corporation, partnership or person.

The general rule of law is that the duly designated board or official ordinarily must receive the application and pass upon it, where it is duly presented or filed in accordance with an ordinance or law (*Reckler v. Quinn*, 254 App. Div. 710, 4 N. Y. S. (2d) 374; *Wilson v. Quinn*, 253 App. Div. 403, 2 N. Y. S. (2d) 6, aff'd 277 N. Y. 720, 14 N. E. (2d) 820).

BUILDING ON UNIMPROVED LOT

(No. 11926—Commissioner of Streets and Sanitation—J. R. B.—July 12, 1955.)

In your letter of recent date you request our opinion on the following questions.

1. Would it be possible with proper ordinances to deny the issuance of a building permit for construction on a lot with which the frontage was not improved according to minimum city standards.
2. Could the installation of street improvements at private expense be effectively required as a condition for resubdivision or consolidation of lots previously subdivided.

Chapter 24, Section 23-70.1 (Ill. Rev. Stat. 1953) provides:

Building for habitation. In municipalities of more than 500,000 inhabitants or municipalities lying wholly or partly within a radius of 30 miles from the corporate limits of municipalities of more than 500,000 inhabitants to prohibit the erection of buildings for habitation on any lot or parcel of land within the municipality unless a highway, road, street or way for public service facilities improved with water mains and sanitary sewers is provided to serve said lot or parcel of land.

It is our opinion that it is possible with proper ordinance to prohibit the issuance of a building permit for construction of a building for habitation within the City of Chicago unless a highway, road, street or way for public service facilities improved with water mains and sanitary sewers is provided to serve said lot or parcel of land.

It is further our opinion that any ordinance seeking to implement the aforementioned statute should be directed toward the denial of the issuance of a building permit.

LICENSING AND TAXING BANKS

(No. 11952—Alderman, 40th Ward—A. F. G.—September 13, 1955.)

Your letter of August 12, 1955, is as follows:

"I am considering an ordinance for the purpose of raising revenue by placing a graduated fee on banks operating in the City of Chicago based on the amount of their deposits. For example, a fee of 1/10th of 1% on the first million dollars of deposits; 1/9th of 1% on the second; 1/8th of 1% on the third, etc.

I should like your opinion as to whether such an ordinance would be a valid one, particularly if made applicable to National Banks doing business in Chicago."

In the *People v. First National Bank of LaGrange*, 351 Ill. 435 (1933), our Supreme Court in holding invalid a tax levied on the shares of the capital stock of a national bank said:

"National banks are not merely private moneyed institutions, but agencies of the United States, created under its laws to promote its fiscal policies, and hence the banks, their property, and their shares cannot be taxed under State authority, except as Congress consents, and then only in conformity with the restrictions attached to its consent. *Des Moines Nat. Bank v. Fairweather*, 263 U. S. 103; *First Nat. Bank of Guthrie Center v. Anderson*, 269 *id.* 341.

The Congress consented to any one of four forms of taxation of the shares of national banks by State authority. Title 12, United States Code, Annotated, section 548, provides: 'The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with: 1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.' Other conditions follow, but neither these conditions nor subdivision (c) of the first clause are pertinent to the questions presented for determination in this case.

The measure of the power of a State to impose taxes on such associations or their stockholders is prescribed by the foregoing section and any assessment not in conformity with it is unauthorized and invalid (*Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664; *First Nat. Bank of Gulfport v. Adams*, 258 *id.* 362). Under the section, shares of the capital stock of a national bank are subject to State taxation in the hands of the individual shareholders (*Van Slyke v. Wisconsin*, 154 U. S. 581). The section only permits the State, when assessing taxes, to include national bank shares in the valuation of the personal property of the owner or holder of the shares. A State tax assessed against a national banking association measured by the value of its shares is not equivalent to a tax upon the shareholders in respect of their shares, and such an assessment against a national bank is beyond the power of the State. *First Nat. Bank of Gulfport v. Adams*, 258 U. S. 362."

The power of the City to tax bankers is found in Section 23-91 of the "Revised Cities and Villages Act" which reads as follows:

"23-91. Tax and Regulate Certain Occupations.)

To license, tax and regulate auctioneers, private detectives, money changers, bankers, brokers, barbers, and the keepers or owners of lumber yards, lumber storehouses, livery stables, public scales, ice cream parlors, coffee houses, florists, detective agencies, and barber shops."

In the early case of *Hinckley v. City of Belleville*, 43 Ill. 183 (1867), our Supreme Court in construing the charter powers of the City of Belleville, which authorized that City "to license, tax, and regulate * * * bankers and money changers", sustained the validity of an ordinance of that city requiring bankers to take out a license and pay a fee of 100 dollars therefor. This decision has never been overruled and we must assume is still the law.

At the time this case was decided the banking business was conducted by private individuals. Since the passage of the State Banking Act, private banks are no longer permitted in Illinois, only corporations organized for that purpose can carry on a banking business in this State.

Based on the decision in the *Hinckley* case we are of the opinion the City has power to tax banks other than national banks. Two former opinions of this office agree with this view. One is reported in Volume 9 Opinions of the Corporation Counsel, p. 383, the other appears in Volume 11 at page 14.

CONCRETE GARBAGE BOX MANUFACTURER

(No. 11974 — Commissioner, Department Street and Sanitation — A. F. G.—October 26, 1955.)

Your letter of October 11, 1955 reads as follows:

"For some years this Department has used every means to prevent the installation of concrete garbage boxes but despite all our efforts, these boxes are still being installed at an alarming rate.

The question has been raised as to whether the manufacturers of these boxes could be put under the class of business requiring a license to operate. Then, if they sold the item for use in Chicago, the license would be cancelled.

Would you give an opinion of the above matter and possibly suggest any other method of approach to the problem that would be practicable."

Power to license or tax an occupation must be expressly granted to cities by the Legislature or be a necessary incident to a power expressly granted (*Barnard & Miller v. City of Chicago*, 316 Ill. 519 (1925)). We find no express power in the Revised Cities and Villages Act which authorizes the City to license and regulate persons engaged in the business of manufacturing concrete garbage boxes.

It is our opinion, therefore, that an ordinance requiring such manufacturers to be licensed would be held invalid for the reason the City lacks power to enact it.

The only suggestion we could make is to educate property owners that the purchase of concrete boxes for the reception of garbage would not meet the requirement of the ordinance and would be a waste of money. Your department is probably in a better position to judge whether such a campaign of education is practical or feasible.

LICENSING STOCK BROKERS

(No. 11998—Chairman, Committee on Finance—A. F. G.—January 5, 1956.)

On November 7, 1955 you sent to this office a copy of a proposed ordinance purporting to impose a license tax of three per cent on the gross receipts from fees, commissions or other charges upon *all brokers* within the city. As drawn the draft would only have imposed the tax on the gross receipts of stock brokers.

We took the matter up with Mr. Todd of your staff, who advised us that Alderman Simon introduced the draft. We talked with Alderman Simon who said his intention was to impose the tax only on stock brokers.

We have prepared and transmit herewith a draft of ordinance in conformity with the Alderman's wishes.

You say it is the desire of your committee that we inform them as to what, if any, powers the City may have to levy such a tax.

Section 1 of Article 9 of the Constitution of 1870 expressly authorizes the General Assembly to tax various occupations, including brokers, the only restriction being the requirement that such tax shall be uniform as to the class on which it operates. The General Assembly delegated to the Cities in the State the power to impose such taxation within their respective jurisdictions (Section 23-91 "Revised Cities and Villages Act"). An ordinance of the City of Chicago imposing a license tax on brokers, including stock brokers, was before our Supreme Court in *Banta v. City of Chicago*, 172 Ill. 204 (1898). In that case in holding the ordinance valid, the court said:

"We think it is well settled by repeated decisions of this court that the State in its sovereign capacity, and the cities and villages of the State by virtue of the grant of power by the General Assembly have ample power and authority to impose license fees upon the occupation of a broker and other trades and occupations mentioned in section 1 of article 9 of the Constitution of 1870, for the purposes either of regulation or revenue." (Citing cases.)

We are of the opinion the gross receipts tax provided for in the proposed ordinance is within the power of the City to impose.

LIABILITY INSURANCE—CITY VEHICLE LICENSE

(No. 12023—Alderman, 39th Ward—R. N.—March 14, 1956.)

You have asked this department to prepare an ordinance which will require an applicant for a Chicago vehicle tag to furnish proof of his carrying motor vehicle liability insurance before a city vehicle tag will be issued to him.

The city of Chicago has no general power to impose restrictions on the operation of motor vehicles. Such specific powers as the city may exercise are set forth in the statute. Section 26a of the Motor Vehicle Law (Ill. Rev.

Stat. 1955, Ch. 95½, sec. 32a) provides that no owner of a motor vehicle who shall have obtained a certificate from the Secretary of State and paid the State registration fee as provided, shall be required to pay any tax or license fee for the use of such motor vehicle by any city, village, town or other municipal corporation other than the one in which the owner resides and a schedule of maximum fees is prescribed in this latter case. It further provides:

"Nor shall such owner be required * * * to comply with other provisions or conditions as to the use of said motor vehicles * * * except as in this Act provided * * *."

Section 42-12 of the above Act, known as the Safety Responsibility Law, requires that the operator or owner of a motor vehicle must, under special circumstances set forth in detail in the Act, carry motor vehicle liability insurance. As the state law designates only certain circumstances under which motor vehicle liability insurance is required, and imposes no conditions regarding financial responsibility as a prerequisite to obtaining a state license, in our opinion the city is without authority to require the owner of a motor vehicle for which a state license has been issued to comply with other provisions or conditions as to the use of said motor vehicle, except as provided by section 26a of the Motor Vehicle Law quoted above.

Further, legislation such as you request would be an attempt to do that which is against the expressed policy of our state legislature. As an indication of the attitude of our state legislators in this matter, we call your attention to the fact that at each one of the last four sessions of the general assembly of the State of Illinois bills were introduced in both the Senate and the House which would require compulsory motor vehicle liability insurance of all registrants of motor vehicles of the first division. At none of the four sessions did any one of the bills pass either House.

However, in compliance with your request, we submit herewith a draft of an ordinance amending section 29-3 of the Code (Application for city vehicle tag) by requiring that a certificate of motor vehicle liability insurance accompany each application.

CIGARETTE VENDING MACHINE—REMOTELY ACTUATED

(No. 12035—City Collector—E. E. M.—April 24, 1956.)

Receipt of your letter of April 6, 1956, attached to which was a photostat of a letter describing a certain cigarette dispenser, is hereby acknowledged. In this letter you request an opinion as to whether this machine comes within the provisions of sections 178-20 to 178-23 of the Municipal Code.

The machine, as described in the photostat, would be actuated by the agent of the licensee upon receipt of the purchase price of the cigarettes which would then be dispensed by the purchaser's mechanical selection of the brand desired. The dispenser would not be a coin operated device. This dispenser does not come within the definition of "cigarette-vending machine" as set forth in Sec. 178-20 of the Municipal Code because it is not "governed or controlled by the deposit of a coin or token."

It is our opinion, therefore, that the device herein described is not subject to the provisions of sections 178-20 to 178-23 of the Municipal Code.

DENTAL LABORATORIES

(No. 12054—President, Board of Health—M. C. H.—July 18, 1956.)

We have before us your letter in which you request an opinion as to the interpretation of Chapter 144 relating to laboratories. You state that the question before you is whether or not commercial dental laboratories require a license for which a fee is paid on the basis of the interpretation of the first sentence in Section 144-4 under Class III Laboratories which provides as follows:

“A laboratory conducted by a person in connection with another business where such laboratory does not directly serve the public for pay and which is maintained as a part of his principal industry or profession. Such laboratories shall be exempt from the payment of a license fee.

“Provided, however, that any person conducting examinations, analyses, experiments, or determinations (whether or not the same are carried on in connection with another business), all of which are without charge, shall be exempt from the payment of a license fee.

“Such license fee shall not apply to municipal, county, state, and federal institutions conducting examinations, analyses, experiments or determinations (Amend. Coun. J. 11-6-47, p. 1172).”

You further state that dental laboratories perform their work for and on the order of a doctor of dentistry who in turn pays the dental laboratory for this work.

It is our opinion that the commercial dental laboratories which perform their work for and on the order of a doctor of dentistry does not fall within the exemptions under Class III of Section 144-4. The first paragraph of Class III pertains to the private laboratory conducted by the doctor of dentistry for his own immediate use; the second paragraph pertains to the conducting of examinations, analyses, experiments or determinations where no charge is made and the third paragraph pertains to governmental bodies.

It is our opinion that the commercial dental laboratories which you describe are controlled by the provisions of Section 144-2 and require a license for which a fee must be paid.

HARDWARE SALES IN DRUG STORES

(No. 12072—City Collector—A. F. G.—August 30, 1956.)

We have your letter of August 13, 1956 which is as follows:

“Enclosed is a copy of a letter from Mr. P. Colden, dba Lake Shore Hardware, 2621 North Clark Street, in which he complains of drug stores and food stores which handle and sell hardware items without being duly licensed as Retail Hardware Stores.

In view of the definitions contained in Section 135-6 of the Municipal Code of Chicago, we are asking an opinion to determine the applicability of Section 135-7 of the Code insofar as it relates to business establishments wherein the sale of hardware is merely incidental to the sale of other merchandise.

Will you favor me with an opinion as soon as possible as to whether Section 135-7 of the Code applies to licensed business establishments where the sale of items of hardware is incidental to the sale of other merchandise."

In an opinion of this office, dated March 1, 1948, in answer to your request for an opinion, on a somewhat similar question, we said:

"Your communication of February 17, 1948 sets forth correspondence between you and the National Tea Company concerning the question whether a Chicago store of the National Tea Company located at 3624 Belmont Avenue, is subject to license under the city's Hardware Stores license ordinance, sections 135-6 to 135-10, inclusive, of the Municipal Code of Chicago, when the store handles certain aluminum ware articles which it gives as premiums upon purchases of articles of food purveyed in the store. It is said that the store is licensed under the Retail Food Purveyors ordinance, sections 130-10 to 130-14, inclusive, of the Municipal Code, and that the company claims that it is exempt from license as a retail hardware store by reason of a proviso contained in section 135-6, the definition section of the Retail Hardware Stores ordinance. Our opinion regarding the question presented by the correspondence is requested.

Section 135-6 reads as follows:

'135-6. Definition.) The term "retail hardware store" is hereby defined to mean any building, room, enclosure, premises, place, establishment, or part of an establishment in the city, operated, maintained, or conducted for the sale or offering for sale at retail of any of the following articles: hardware; tinware; aluminumware; enamelware, cutlery; tools; implements; apparatus; machinery; plumbing; engineers', janitors', blacksmiths', contractors', or electrical supplies; gas, plumbing, or electrical fixtures; other articles or wares made largely of metals; kerosene; rifles, shotguns, and loaded shot shells or cartridges where not more than 25,000 are kept on hand at one time; provided, however, that dealers or establishments of a similar nature specifically defined and licensed by other parts of this code shall be exempt from the provisions licensing retail hardware stores.'

It will be noted that aluminum ware is specifically mentioned. The keeping of aluminum ware for distribution with other articles offered for sale is in our opinion effectually the keeping and offering for sale of such ware. This being so the store comes within the terms of the ordinance.

The proviso contained in the above quoted section obviously is intended to exempt from license dealers in the articles specifically mentioned in section 135-6 who are licensed under other provisions of the Municipal Code, which articles are of a similar nature to those mentioned in section 135-6 and which are specifically defined in other parts of the code.

We do not regard a grocery store or retail food purveying establishment to be of a similar nature to a retail hardware store or find that the articles specifically mentioned in section 135-6 are specifically defined in the Retail Food Purveyor's ordinance, hence we are of opinion that the contention that the store is exempt by virtue of the proviso is not sound.

As the company effectually offers hardware for sale and is not exempted by the proviso our opinion is that the company's business comes within the purview of the Hardware Stores Ordinance and is subject to license under it." (Opinions of the Corporation Counsel, Volume 22, page 341.)

The City does not license drug stores as such, but where a drug store sells food it is required to have a Food Purveyor's license, or if it sells cigarettes it must also have a cigarette license and we see no reason why if it sells hardware and paints it should not be required to take out a license as a Retail Hardware Dealer as the foregoing opinion holds.

Mr. Colden suggests that in order to discourage dealers who are engaged in an unrelated business from carrying on the business of a retail hardware dealer, to have the City impose a heavy license fee on such dealers for engaging in the hardware business. License fees for the regulation of a business not only must be reasonable but must also apply uniformly upon all persons similarly situated. An ordinance which would impose a heavy license fee on a retail hardware dealer who conducts such business incidental to his main business, while imposing a comparatively lighter fee on a retailer who deals in hardware exclusively, would not, in our opinion, meet the test of uniformity.

In view of the foregoing holding of this office we are of the opinion that section 135-7 applies to a retail dealer who sells hardware incidental to his main business whether or not the main business is required to be licensed.

SPECIAL POLICEMAN FOR VARIOUS LOCATIONS

(No. 12081—Commissioner of Police—A. F. G.—October 16, 1956.)

Your letter of October 3, 1956 reads as follows:

"I have received the following request from Beryl A. Birndorf, attorney, 1 N. LaSalle St.

'On behalf of my client, Liberty Realty and Management Co., application is hereby made for a Certificate of Appointment as a special policeman for Felton Bridgewater, to cover the following hotel properties, managed and operated by the Liberty Realty and Management Co., for which special services are required:

Walgreen Hotel, 4201 Ellis Av.

King Hotel, 4053 Ellis Av.

Olympia Hotel, 4459 Oakenwald Av.

Trux Hotel, 2444 S. Michigan Av.

Lemont Hotel, 6239 Kenwood Av.

In the event that one certificate cannot be issued to cover all of the above properties, it is requested that an individual certificate be issued for each of the properties, so that the services of the same special policeman will be available to all of the above listed hotel operations.

This service is necessary for the protection of the property and persons and the safety of the guests of the hotels and management.'

Will you kindly advise me as to my powers in commissioning an individual as requested."

Chapter 173 of the Municipal Code of Chicago deals with "Special Policemen". Section 173-1 is as follows:

"The term 'special policeman' is hereby defined as any person who, for hire or reward, shall guard or protect any building, structure, prem-

ises, person, or property within the city; provided, however, that this shall not apply to regularly appointed police officers of the city or to any sheriff or deputy sheriff of the county."

Section 173-3 of the same chapter reads:

"An application of any person showing the necessity of appointment as a special policeman shall be made to the commissioner of police. The commissioner of police shall have power to appoint and swear in any number of special policemen to do special duty at any fixed place in the city, or at any of the necessary places for the protection of persons, passengers, and property being transported in interstate or intrastate commerce within the city, at the expense and charge of the applicant."

In an opinion dated April 22, 1937 reported in Vol. 19, p. 28, Opinions of the Corporation Counsel, on the same subject matter you now ask advice, we held:

Persons commissioned as special policemen possess all the powers of regular policemen, but the place where those powers are to be exercised must be definitely and clearly circumscribed.

It is within the discretion of the commissioner of police to determine whether one commission for a special policeman shall suffice for more than one location, but if a commission is issued for more than one location, each place should be definitely described in the commission.

No property owner is required to provide special police service to protect his property, but if he does elect to provide such service at his own expense, he alone is the judge of the adequacy of the service furnished. In this case if the management company feels that one special policeman can provide adequate police service at their five hotels, we know of no legal objection to your granting their application.

VEHICLES WITH SOUND AMPLIFIERS

(No. 12084—Alderman, 33rd Ward—A. F. G.—November 1, 1956.)

Your letter of October 23, 1956 reads as follows:

"I am respectfully requesting your cooperation in furnishing me as soon as possible with an opinion as to the type of license—both City vehicle and State—required for display on passenger automobile equipped with sound apparatus. It is my understanding that truck licenses are necessary for this type of vehicle but, in view of the fact that the City of Chicago operates a passenger automobile with sound equipment attached and which bears passenger car City and State licenses and to alleviate possible misunderstanding as to the requirements in this particular instance, I will sincerely appreciate a legal interpretation from your office."

We consulted the office of the Secretary of State and were advised that passenger vehicles are given passenger vehicle plates, but where the applicant states in his application that the vehicle is equipped with sound apparatus (loud speaker) and is used or to be used for commercial purposes they would require the vehicle to display a truck license.

Motor vehicles owned by the State of Illinois, the City of Chicago or any other governmental agency in Illinois are required to pay a State license fee for vehicles of the first or second division of only two dollars for each vehicle owned or operated by it (Sections 8 and 9 Motor Vehicle Law Pars. 8 and 9 Chap. 95½ Ill. Rev. Stats. 1955).

The Secretary of State also advises us that there is no distinction in the plates furnished to municipalities for use on vehicles of the first or second division except the number. If the City of Chicago owns and operates a passenger vehicle and a ten-ton truck, each will display the same kind of plate except that the number will be different.

Section 29-15 of the Municipal Code of Chicago exempts vehicles owned and operated by the City of Chicago from the payment of the vehicle tax.

The statement that the City of Chicago operates a passenger automobile with sound equipment attached and bearing passenger car City and State licenses, is obviously in error, as no City license is required, and State licenses for municipal vehicles are the same for all types of vehicles.

LICENSING MOTOR REPAIR SHOPS AND SECOND-HAND DEALERS

(No. 12090—City Collector—A. F. G.—November 27, 1956.)

In your letter of October 17, 1956 you state that in compliance with Section 101-24 of the code, you are preparing to send written notices to licensees where such licenses will expire on December 31, 1956.

You refer to Sections 156-5 through 156-9 and Sections 168-1 through 168-10 of the Code, which respectively provide for the licensing and regulation of motor vehicle repair shops and second hand dealers. You state that this office has many times expressed doubt as to the legal authority under which the provisions aforesaid may be enforced. In view of the foregoing, you request our opinion in answer to the following questions:

“1. Would it be proper and advisable for this office to mail renewal of license notices to motor vehicle repair shops now licensed by virtue of the provision of Section 156-6 of the Code?

2. Would it be proper and advisable for this Office to mail renewal of license notices to second-hand dealers in accordance with the provision of Section 168-1 of the Code?

3. Will you, for the guidance of this Office, and the license enforcement division thereof, clarify the present legal status of the Sections of the Ordinances aforementioned so that we can determine a course of procedure to be presently employed in the enforcement of the Sections of the Ordinances in question?”

In an opinion dated March 22, 1950 and appearing in full in Volume 23, p. 560, Opinions of the Corporation Counsel, with reference to the validity of the ordinance which provides for the licensing and regulation of motor vehicle repair shops we held in our opinion the ordinance is invalid and cannot be sustained and recommended the city council repeal it. We do not believe you should mail renewal of license notices to motor vehicle repair shops now licensed by virtue of Section 156-6 of the Code.

The Legislature has given power to cities to license and regulate second-hand dealers by Section 23-94 of the Revised Cities and Villages Act, which Section reads in part as follows:

“To license, tax, locate and regulate all places of business of dealers in junk and rags, and any second hand articles whatsoever,
* * *”.

An ordinance of the City of Chicago licensing and regulating second hand dealers in automobile parts and tires, etc. was before our Supreme

Court in *Bullman v. City of Chicago*, 367 Ill. 217 (1937). In holding the ordinance invalid under the power granted by the section referred to above the Court said:

"It is apparent from a reading of the statute under consideration that the general words 'any second hand article whatsoever' follow the particular and specific words 'junk, rags,' and under the doctrine of 'ejusdam generis' they must be construed to include only things of the same kind as those indicated by the preceding particular and specific words."

This decision holds that while the City does not have power to license and regulate second hand dealers generally, it does have power to license and regulate dealers in articles of the nature of junk and rags. We commented on this decision in an opinion dated March 21, 1950 published in full in Volume 23, p. 559, *Opinions of the Corporation Counsel*.

If your records of second hand dealers licenses is so kept that you can separate those the City has power to license from those the City does not have power to license, renewal of license notices should be mailed only to the former. If, however, the licenses cannot be separated, then we are of the opinion you should mail renewal of license notices to all second hand dealers now licensed by the city.

STATE SAFETY STICKERS ON INTERSTATE CARRIERS

(No. 12119—*Commissioner of Police—E. V. H.—May 6, 1957.*)

We have your letter of April 22, 1957, containing a quotation from a letter of R. W. McDorman who persists in his contention that interstate motor freight carriers are not required to obtain an Illinois safety sticker.

You also enclose a letter from Latham Castle, Attorney General, State of Illinois, to the effect that enactment of federal legislation regarding safety of operation and equipment used by motor freight trucks in interstate commerce precludes legislation by the various states on that subject.

You will recall that by letter of March 22, 1957, we expressed the opinion that:

"Police officers of this city have the legal right to issue a summons to the owner of any interstate motor freight truck whose vehicles do not display thereon the Illinois safety sticker, even though they may bear an Interstate Commerce Commission number."

We have reviewed federal legislation and the cited opinions of the Attorney General regarding this matter and believe we are legally correct in our opinion of March 22, 1957, aforesaid.

However, in view of the contention of certain carriers whose drivers were arrested over the week end of April 27th for failure to comply with this Illinois law, we consulted Mr. Harry P. Raymond, District Director of the federal Bureau of Motor Carriers. He has confirmed the opinion of these carriers that the federal regulations as to safety are much more stringent than those of our state law and that by complying with them the object of the state law is met and exceeded.

Mr. Raymond further informs me that several states, similarly faced with the problem of determining whether interstate carriers comply with state safety laws, have adopted the practice of relying on the carrier's

display of his I. C. C. operating number as being a reliable indication that it is in substantial compliance with the federal safety regulations. Therefore, these states exempt such carrier from compliance with their state law.

It is the opinion of this office that adoption of such a policy would satisfactorily resolve this question. We, therefore, suggest that police officers of this city be advised to accept an interstate motor freight carrier's display of its I. C. C. operating number as an indication of such substantial compliance with federal safety regulations as would exempt the carrier from obtaining and displaying the safety sticker required by our state law.

WHOLESALE JUNK DEALERS

(No. 12124—City Collector—J. P. M.—June 5, 1957.)

We acknowledge receipt of your recent letter in which you request an opinion as to whether a dealer in junk who buys and sells scrap iron and steel in carload lots and does not purchase from itinerants or other individuals off the street, is subject to the license provisions of Chapter 143 of the Municipal Code of Chicago.

Also attached to your letter is a letter from Lissner Iron & Metal Company, which cites the case of *City of Chicago v. Iroquois Iron & Steel Company*, 284 Ill. App. 561, as authority for exempting the company from the necessity of obtaining a wholesale junk dealers license.

In the *Iroquois* case the Court decided that under the grant of power given municipalities under the Cities and Villages Act of 1933, municipalities did not have the power to license wholesale dealers in junk. The Court stated at page 565:

"In conferring on cities and villages the power to tax, license and regulate junk stores, the General Assembly doubtless contemplated that the power would be exercised with respect to places of business commonly known and understood as such."

The Court went on to hold that the power to license junk stores and yards could not be extended to license wholesale dealers in junk.

The Illinois Legislature later amended the grant to the Cities and Villages regarding licensing of the junk business. The present grant reads as follows:

"To license, tax, locate and regulate all places of business of dealers in junk, rags, and any second hand article whatsoever.

To forbid any person from purchasing or receiving from minors without the consent of their parents or guardians, any article whatsoever." (Chapter 74, Section 23-94, Illinois Revised Statutes, 1955.)

It can be seen from this section that the Legislature intended to give to municipalities the power to license, tax, locate and regulate all places of business of dealers in junk and inasmuch as the *Iroquois* case interpreted an entirely different statute, this office is of the opinion that the *Iroquois* case does not apply under the law as it exists today.

We are further of the opinion that under the statute cited above, the City of Chicago has the power to tax, license, regulate and locate all dealers in junk whether they be wholesale or retail dealers.

TRANSFER OF NURSING HOME LICENSE

(No. 12167—City Collector—L. A. W.—October 3, 1957.)

In connection with our discussions with Mr. Geis of your office in regard to the transferability of nursing home licenses, we are of the opinion that such licenses may be transferred *only with the permission of the Mayor*. The reason for our opinion is as follows:

An examination of the pertinent Illinois statutes and of the decisions relating to the subject and rules heretofore applied, as pointed out in an opinion rendered by this office on July 12, 1905, reveals it was held in this State that without express ordinances to that effect, licenses were not transferable. (*Munsell v. Temple*, 8 Ill. 93; *Lombard v. Cheever*, 8 Ill. 469.) Therefore, this rule still holds good unless by express provision of the ordinances enacted, transfers can be made.

The courts of our State have also recognized another rule in passing on the transferability of licenses to the effect that licenses imposed for regulation are not transferable, but that where imposed solely for purpose of revenue, they are transferable (Am. and Eng. Enc. of Law, 2nd Ed., Vol. 21, p. 825). However, this rule has no application in the face of the express terms of the section of the Municipal Code relating to transfer of licenses.

Section 101-18 of the Municipal Code of Chicago provides as follows:

"Where the transfer is not otherwise prohibited, any person to whom any license shall have been issued may, *with the permission of the mayor*, assign and transfer the same to any other person of approved character and qualifications. Such assignment shall be executed in the form prescribed by the city clerk. The person to whom such license is issued, or the assignee of such license, shall surrender such assigned license to the city clerk, and if required to do so by the city clerk shall surrender any license certificate, tags, plates, badges, emblems, or other insignia which have been issued to the licensee. A new license, authorizing the assignee or transferee of such license to engage in the same business or occupation at such place as may be named in such new license; provided, however, no business or occupation shall be engaged in at any new location until such assignee or transferee shall have complied with the provisions of this code relating to the engaging in of such business or occupation at such new location. In all cases where a bond is required, the person obtaining such new license shall give a bond with sureties which shall conform as near as may be to the bond upon which such surrendered license was issued.

"*Not more than one transfer of ownership shall be allowed on any license—Except where otherwise expressly provided, the fee for such transfer of ownership shall be two dollars.*"

The power to license comes within the police powers of a municipality. The right to license is given the City on that ground by the statutes. The City, having power to license, it must follow that it has the right to make rules governing the transfer of such licenses in all cases where it is not against public policy to do so. Since Section 101-18 provides for a transfer if the procedure therefore is followed, then the inescapable conclusion is that nursing home licenses are transferable *only with the permission of the Mayor* in accordance with the procedure outlined in Section 101-18 of the Municipal Code of Chicago.

LICENSING CONCRETE CONTRACTORS

(No. 12172—Commissioner of Buildings—E. W. P.—October 28, 1957.)

We are attaching copy of an original letter which we received from Demling & Heindl, Attorneys at Law, 139 N. Clark Street, Chicago 2, Illinois which contends that concrete contractors are not mason contractors, and that Chapter 24, Section 22-43 of the Illinois Revised Statutes providing for the licensing of mason contractors, has no application to concrete contractors, and that our definition in Section 151-1 erroneously includes all work in concrete with the exception of laying concrete sidewalks and concrete pavement.

Mr. Demling in the last paragraph of his letter seeks "a ruling that concrete contractors are not encompassed by the Chicago Mason Contractor's Licensing ordinance." Mr. Demling in the second paragraph of his letter advises that one of the contractors who he represents had a job to do with a concrete floor and which job was stopped by the City, apparently because of violations of Sections 151-1 through 151-8.

The terms of "masonry" or "mason work" are defined to mean all work in brick, stone, *concrete*, terra cotta, tile and fireproofed, or any combination of these materials as used in and about the construction of buildings or structures above or below the surface of the ground, with the exception of laying brick or concrete sidewalks and brick or concrete paving.

Chapter 24, Article 22-43 to 22-48 pertains to licensing of mason contractors and empowers the City of Chicago to provide for a Board of Examiners who shall prescribe rules and regulations for the materials, construction, alteration and inspection of all mason work placed on, or upon, or in connection with any building in the municipality and to provide further that no mason work shall be done upon any building without a permit being first issued therefor by the Building Department upon such terms and conditions as the municipality shall prescribe.

The word "masonry" has been subject to the process of evolution according to Corpus Juris Secundum, volume 55 at page 979. Originally it meant a construction made of stone laid with or without mortar; later the term was applied to concrete and reinforced concrete construction. *Worcester v. Boston and A. R. R.*, 114 N. E. 814 at page 817; *Shannon v. Hinsdale*, 180 Illinois, 202; *Elgin v. Joslyn*, 136 Illinois, 525 and *Joseph N. Eisendrath Co. v. Gebhardt*, 124 Illinois Appellate, 325 at page 331.

In view of our statutory power, the governing ordinance, Chapter 151 of the Municipal Code is sound and valid and mason contractors include so-called concrete contractors when their work embraces the use of concrete with the specific exceptions as contained in the definition in Section 151-1.

We are advising Demling & Heindl, Attorneys at Law at 139 N. Clark Street, that the Law Department renders opinions only to the Mayor of Chicago, City Council and Heads of Departments, but that we do not agree with the conclusions as set forth in their letter of October 14, 1957.

LICENSING BROKERS

(No. 12232—City Collector—R. N.—June 17, 1958.)

You sent to this department copy of a request from a firm of engineers—Edward L. Spence & Associates, 612 N. Michigan Avenue—for an opinion as to the legal status of the Chicago ordinance licensing general brokers, with particular emphasis on whether the basis of the ordinance is for the purpose of regulation or of producing revenue for the municipality.

Chapter 113 of the Code contains provisions relating to the licensing of general brokers, insurance brokers, passenger ticket brokers, and real estate brokers. It was passed in pursuance of the statutory grant of authority to the city:

"To license, tax, and regulate * * * brokers * * *" (Revised Cities and Villages Act, section 23-91).

The validity of the ordinance has been upheld by our Supreme Court in the case of *Banta v. City of Chicago*, 172 Ill. 204. The court, in its opinion (p. 220) states:

"In the view we take of the case it is not material to determine whether the license fee is for revenue or for purposes of regulation. We think it is well settled by repeated decisions of this court that the State in its sovereign capacity, and the cities and villages of the State by virtue of the grant of the power by the General Assembly, have ample power and authority to impose license fees upon the occupation of a broker * * * for the purposes either of regulation or revenue."

An extra copy of this letter is enclosed herewith in case you wish to forward it to Mr. Spence.

BOULEVARD DRIVEWAY PERMITS

(No. 12243—Commissioner of Streets and Sanitation—J. C. M.—July 22, 1958.)

You recently inquired as to the effect of the consolidation of certain functions between the City and the Chicago Park District upon the driveway permits issued by the Park District in relation to streets and boulevards presently under its jurisdiction.

This question has been disposed of in the case of *McCormick v. South Park Commissioners* (1894), 150 Ill. 516, where it was held that the City of Chicago had no jurisdiction over the streets and boulevards, the control of which had been given to the South Park Commissioners and that such control was exclusive in the South Park Commissioners. In reverse, the same would be true. Therefore, all permits for driveways on streets and boulevards, that are returned to the jurisdiction of the City of Chicago will be of no further force and effect after January 1, 1959 and the City of Chicago will have exclusive jurisdiction over such matters.

MINOR PLUMBING REPAIRS

(No. 12255—*Commissioner of Water and Sewers—W. M. Z.—October 17, 1958.*)

Please refer to your communication of October 15, 1958, with reference to the above matter, which communication in part is as follows:

"Mr. Green feels that this work is covered by the definition of 'Minor Repairs' and therefore does not require a permit nor a licensed plumber to make the corrections.

"In view of this situation it is requested that a legal opinion be given defining the number of faucets and valves which may be replaced by other than licensed plumbers and without the necessity of obtaining a permit."

We have carefully examined the Illinois Revised Statutes and our Municipal Code and have been unable to find any portion of said Statute or Code which defines the number of faucets and valves which may be replaced by other than licensed plumbers, etc. However, may we call to your attention Section 82-2 of the City Code, Chapter 82, "Plumbing Provisions" which reads as follows:

"Minor Repairs. The mending of leaks in drains, soil, waste, vent, water supply piping, faucets and valves; the replacing of a fixture in the old location, forcing out an obstruction and a replacement of a faucet or valve or not more than ten feet of either soil, waste, or vent piping."

May we also call to your attention Section 83-5 which reads as follows:

"Every person who shall construct, enter, alter or use any part of the Chicago water works system and every consumer of water and owner, occupant, or person in possession, charge or control of any building, structure, or premises having service therefrom, shall be governed by and subject to the provisions of this code governing the use of water and also such other rules and regulations governing the use of water as may from time to time be adopted and approved by the city council. It is hereby made the duty of the commissioner of water and sewers to enforce the provisions of this code governing the use of water, and also any rules and regulations that may be adopted as aforesaid."

It, therefore, appears that the Commissioner of Water and Sewers is empowered to make the decision as to which repairs fall in the category of "Minor Repairs".

BARBER SHOP LICENSE

(No. 12269—*City Collector—A. F. G.—January 28, 1959.*)

On October 29, 1958 we sent you a letter in answer to one of yours of October 22, 1958 in which you asked: "2. Would a barber shop be licensed in compliance with the provision of section 107.1-2 of the Code where each barber engaged in barbering on the premises secures a license in his own name to cover only the chair at which he is engaged, which results in a multinumber of City of Chicago Barber Shop licenses for different individuals for the same premises."

After holding, in answer to another question that we did not believe the barber shop license ordinance can be construed to limit the issuance of a license to conduct a barber shop to one person at a particular place, we said:

"However, in view of other provisions in the barber shop ordinance to which we shall refer, we do not believe it was the intention of the city council to issue barber shop license as outlined in your question 2.

Sections 107.1-5 and 107.1-6 impose certain duties on every person licensed to conduct a barber shop. The first of these sections requires the licensee 'to at all times to keep the licensed premises in a clean and properly sanitary condition. All measures shall be taken to properly safeguard the life and health of patrons and all persons engaged therein against communicable and contagious diseases.' The other section provides for the cleanliness of barbers and employees, the washing of towels and wash cloths and the sanitary condition of receptacles, finger bowls, utensils, vessels and appliances, and requires separate receptacles for soiled towels, and separate receptacles for discarded shaving and other paper.

If either or both of these sections are violated would each of the licensees be fined or if the violation was serious enough to warrant revocation, would the licenses of each of the fifteen barbers be revoked? If each of the fifteen licensees are jointly and severally liable for any violation of the barber shop ordinance many unjust consequences would result. The Supreme Court of this state has repeatedly held where possible, a statute will not be construed so as to lead to evil, unjust, oppressive, or absurd consequences or to self contradiction (*People v. Brundage*, 296 Ill., 197), or absurd consequences is to be avoided if possible (*Village of Glencoe v. Huford*, 317 Ill. 203).

In view of the complications which could arise if licenses were issued as provided in your question 2, we do not believe the city council intended that licenses of this type should be issued, and doubt if the courts would attribute such an intention to the council."

Since writing this opinion the attorney for the barbers involved in this controversy has written this office giving additional facts and requesting that we revise our opinion, in view of this additional information. He says in part:

"I represent: Richard Davis, Alfred Grajek, Edward Baikauskas, Ferrel Handley, Theodore Poskonka, Robert E. McKinney, Paul E. Kinney, Elza C. Dorworth and Sam Rossi, being all of the Master Barbers in the 'Veterans Barber Shop', a cooperative barber shop, at 33 East 111th Place. In the said barber shop are fourteen chairs which they lease under separate written leasing agreements. Under the leasing agreement a fixed rental is paid weekly for each barber chair. No wages whatsoever are paid to the coop-barbers. The coop-barbers are independent contractors free to work or go at any time their pleasure indicates. They are not subject to the order of any employer. Each coop-barber collects directly from the customer for the barbering services and makes no accounting to anyone. By mutual agreement each barber charges \$1.00 for a haircut. The coop-barbers pay income taxes and social security as self-employed persons, as well as other taxes and expenses. Each coop-barber purchases his own tools.

In the case of *Alfred W. Grajek v. Ray F. Cummins*, Director of Labor of the State of Illinois, No. 56 S 13390, the Director of Labor contended that the tenant barbers were in reality employees. On March 15, 1957, a final judgment order was entered in said cause overruling and reversing the contention of the Director of Labor. Part of the findings of the Court in the said judgment order were:

'And the Court further finding that the barber-leases of the Plaintiff lessor, were engaged in independently established trades

and, were free from the control or direction of Plaintiff both under their contract of lease and in fact * * *

The said cooperative barber shop was established in July 1949, and in that year and every year subsequent thereto to this time, each coop-barber purchased his own City Barber Shop License. Although there are fourteen chairs in the barber shop fourteen licenses are not issued because some barbers have apprentices working for them. There are only nine barber-tenants who procure licenses.

Section 107.1-1 of the Municipal Code of Chicago provides 'a barber shop is defined to mean any building, room, *place*, or establishment wherein the occupation is carried on of shaving or trimming the beard or cutting and dressing the hair of patrons for a consideration. The term shall also include a tonsorial parlor and barber school.' (Emphasis added.)

The word 'Place' is defined in Words & Phrases, Vol. 32 A. Page 118, and citing *Bradford v. Hurt*, D. C. Texas 15 F. Supp. 426, 428 as:

'Place is a building, part of a building or other spot set apart for special purpose.'

In *Prentiss v. Davis*, 22 A. 246, 83 Me. 364, Webster's Dictionary was quoted defining 'Place' as:

'An area, any portion of space regarded as distinct from other space'.

Bouvier's Law Dictionary in defining 'Place' states:

'This word is a very indefinite term. It is applied to any locality, limited by boundaries however large or however small.'

It is clear therefore that a barber shop need not comprise an entire building or room, and no particular area is legally proscribed. No partitions or form of physical division is legally required to be erected between barber shops by any ordinance or statute. Nor is there any legal prohibition to independent barbers establishing their own barber shop business in one room in a joint cooperative venture.

The right of my clients to operate their coop-barber shop as independent self-employed persons is a valuable property right. In *Eden v. People*, 161 Ill. 296, 43 N. E. 1103, it was held that an act forbidding barbers to keep open their shops or work at their trade on Sunday, was invalid as taking property without due process of law. To refuse the coop-barbers the right to operate their own barber shop is an unjust taking of a much more valuable property right.

Further, the barbers have been licensed and operating on this cooperative basis for many years. The opinion of your office operates as a retroactive taking of an existing right.

Your letter opinion bases its view that my clients should not each be entitled to their own barber shop license on the theory that the multiple licenses make it difficult to enforce the provisions of the City Ordinance.

However, each coop-barber is responsible for his own chair, equipment, supplies, and the space he rents. Each coop-barber is responsible to keep his own space clean, to keep his own appliances clean, to arrange for his own disposal, etc. In short, each coop-barber is a self-employed, self-contained unit. If there is a violation of any City Ordinance, there would be no indistinct or overlapping areas of responsibility between the coop-barbers to cause the City difficulty. Over the many years that the City has issued these licenses, no such difficulties have occurred. My clients have complied with all law and have had no complaints or problems with City or State Authorities.

It is respectfully submitted that if your office was familiar with the facts set forth in this letter, it would not have been the opinion of your office that the issuance of the licenses was of great inconvenience. Hoping you will see fit to amend your opinion of October 29, 1958, in view of these additional facts."

In view of this additional information which we did not have when our opinion was written, particularly the fact that for 10 or more years these barbers have been issued individual barber shop licenses, under the same conditions that exist to-day, we are inclined to revise our opinion. As none of the unjust consequences which we feared would result from this type of licensing materialized in ten years, we now think our fears were unfounded, and recommend that you continue to license these barbers as you have for the past ten years.

COIN OPERATED PARKING FACILITIES

(No. 12274—City Collector—A. F. G.—April 9, 1959.)

The first paragraph of your letter of February 13, 1959 is as follows:

"There appears to be a growing tendency on the part of owners and operators of public garages (parking lots) in the City of Chicago to conduct the business of a public garage for hire where parking of automobiles is accomplished without supervision by paid attendants. These public garages (parking lots) make use of the automatic gate system or some other mechanical system which eliminates the use of personnel and still functions to collect the parking fee and prevents unrestricted parking. This type of public garage (parking lot) has been established throughout the City and the majority of such parking lots appear to be independent business ventures not connected in any way with neighboring business establishments or occupants of residential units. These parking lots appear to be wholly in the business of furnishing parking facilities for hire to the general public for profit."

You then refer to Section 156-15 of the Municipal Code of Chicago, which reads as follows:

"No person shall engage in the business of a public garage without first having obtained a license therefor."

You then quote Section 156-13 of the said code as follows:

"The term 'public garage' as used in this chapter is hereby defined as meaning any building, structure, premises, enclosure, or other place, except a public way, within the city, where two or more motor vehicles are stored, housed, or parked for hire, in a condition ready for use, or where rent or compensation is paid to the owner, manager or lessee of the premises for the housing, storing, sheltering, keeping, or maintaining of such motor vehicles. *Provided, that nothing in this section shall be construed as applying to off-street parking of passenger vehicles with seating capacity of not more than seven passengers on vacant property maintained for the accommodation of patrons or employees of business establishments or occupants of residential units, where such parking is permitted without supervision by paid attendants*".

You state, in view of the foregoing provision for exemption, a question arises as to when a public garage (parking lot) for hire is subject to the license provision of Section 156-15 of the Code.

In the construction of statutes and ordinances it is a fundamental rule of construction where the meaning is not clear to ascertain if possible the

intention of the legislative body enacting the statute or ordinance. From the language used in the two sections quoted above it appears to have been the intention of the city council to require every garage where cars are parked for hire to be licensed. It is our opinion that where open air garages are established for the accommodation of patrons or employees of business establishments or for the accommodation of tenants of residential units without the payment of compensation, the council intended by the exemption in Section 156-13 that where no paid attendant was employed to collect the hire that no payment was intended and such a parking lot was not to be deemed a public garage requiring a license. We are also of the opinion that where the owner of such a parking lot employs a coin-operated device which collects the hire as effectively as a paid attendant, that the council did not intend that the use of such coin operated devices, would exempt the owner from securing a license to operate.

We suggest that you require owners of public garages where fees for parking are collected by mechanical means to take out a license as a public garage. If the courts should hold that our interpretation of the exemption is not correct, we suggest that the exemption provision referred to be amended to exclude from the exemption parking lots where coin operated devices are employed in lieu of a paid attendant, as it appears that such was the intention of the city council.

SMALL ANIMALS LICENSE

(No. 12280—City Collector—A. F. G.—April 30, 1959.)

Your letter of March 16, 1959 is as follows:

"Section 105-1 of the Municipal Code of Chicago provides as follows:

'No person shall engage in the business of buying, selling, or dealing in birds, dogs, or other small animals used as household pets or used for domestic purposes, without first obtaining a license.'

In an opinion addressed to me, under date of December 14, 1948, it was stated that 'while gold fish and small turtles are animals within the broad meaning of that word, we doubt that it was the intention of the City Council when enacting the ordinance to subject to license persons who only incidentally deal in gold fish and small turtles * * *'

In conclusion it was further stated that 'it is therefore our opinion that * * * concerns * * *, who but incidentally or occasionally deal in gold fish and small turtles, should not be asked to procure licenses under the ordinance.'

Now a question has arisen as to whether persons who engage in the sale at retail of gold fish, tropical fish, small turtles and other small aquatic animals as the *main business*, and not as *incidental* or in *conjunction* with another business, are required to procure a license in accordance with Section 105-1 of the Code.

We would therefore like your opinion on this question.

Also, Section 95-29.1 of the Code provides, in part, 'it shall be unlawful for any person to keep, sell or offer for sale at retail any live poultry or other live fowl, or to slaughter or cause to be slaughtered for sale at retail any live poultry or other live fowl without first having obtained a license to do so * * *,' whereas Section 105-1 of the Code, as previously cited, provides 'No person shall engage in the business of

buying, selling, or dealing in birds, dogs, or other small animals used as household pets or used for domestic purposes, without first obtaining a license.'

Accordingly, we would like your opinion as to whether the sale at retail of chicks, ducklings, and other baby fowl as household pets for children would be governed and regulated by Section 105-1 of the Code applicable to small animal dealers, or would the sale of such baby fowl more properly be licensed under Section 95-29.1 of the Code pertaining to the sale of live poultry."

We have read the opinion of 1948 referred to above and agree with the conclusion reached, that where persons who deal only incidentally in the things referred to in Section 105-1, should not be required to procure a license therefor.

However in answer to your first question we are of the opinion that where persons engage in the sale at retail of gold fish, tropical fish, small turtles and other aquatic animals as household pets or for domestic purposes, as the main or principal business and not as incidental or in conjunction with another business are required to procure a license in accordance with Section 105-1 of the Code.

Answering your second question we are of the opinion that the city council did not intend that the business referred to should be licensed under Section 95-29.1 of the Code. Chapter 95 of which the above section is a part is entitled "Care of Foods" and provides strict regulations for the keeping and handling of food for human consumption. Gold fish, tropical fish, small turtles and other small aquatic animals are rarely, if ever, used as food and we do not believe it was the council's intention that the business of dealing in them should be licensed under a chapter of the Code which deals solely with the care of food.

LICENSING CURRENCY EXCHANGES

(No. 12285—Committee on Licenses—A. F. G.—May 25, 1959.)

Your letter of May 21, 1959, is as follows:

"At considerable cost, the City of Chicago affords extraordinary police protection to currency exchanges, specifically in the handling of money and in the apprehension of passers of bad paper, an expense with which the owners of real estate should not be saddled. I am, therefore, requesting your consideration in the matter of drafting an ordinance to license and regulate such business operation, with an annual fee of \$100.00. A city ordinance to regulate currency exchanges was declared to be invalid some few years ago, which ordinance, however, was devoid of provisions indicating the need for the special protection demanded by currency exchanges.

There is in existence at the present time a State Law regulating exchanges. This, however, pertains only to the character of the operator and the method in which such business is conducted. The State has not the manpower to provide protection in the physical operation of the business.

If, in your opinion, a legal ordinance cannot be drafted, I will appreciate your submitting an amendment to the Cities and Villages Act, empowering the City of Chicago to license and regulate currency exchanges, which I will endeavor to have presented in this session of the General Assembly."

On December 13, 1943 the city council of Chicago enacted an ordinance providing that no person shall engage in the business of or conduct a currency exchange without first having obtained a license to do so at the annual fee of \$75.00. The validity of this ordinance was attacked and held invalid in *Arnold v. City of Chicago*, 387 Ill. 532. The basis of the decision holding the ordinance invalid was that the power to regulate, license or tax the currency exchange business was never granted to the city council of Chicago and that therefore the council was without legal power or authority to pass the ordinance.

We have prepared and submit herewith draft of a Bill amending Section 23-91 of the "Revised Cities and Villages Act", which if enacted by the General Assembly would grant to the city council power to enact an ordinance such as you propose in your letter.

As the session of the 71st General Assembly is fast drawing to a close we suggest you take immediate steps to have the proposed Bill presented to the General Assembly.

LICENSING PRIVATE PARKING LOT

(No. 12325—City Collector—A. F. G.—March 4, 1960.)

With your letter of February 18, 1960, you enclosed a letter from Attorney Thomas M. Morris, 111 W. Washington Street, which reads as follows:

"Recently a gentleman from your office called on the Frontier Parking Club, 3940 Frontier Street, concerning an alleged tax of \$5.00 per space.

I have had an opportunity to examine the opinion written by Al Gorman of the Corporation Counsel's office and from that opinion it appears that this \$5.00 tax is due and collectible from all public parking places.

This letter is being written to point out that the Frontier Parking Club is in no way public. It is strictly a private enterprise. The parking facilities are not open to the public. It would appear that your investigator assumed, because of the presence of a gate on the premises, that anyone possessing a coin could enter and park a car. This particular parking area is restricted to those who sign a contract agreeing to certain conditions and the parking facilities are made available to such individuals providing they pay a monthly stipulated price, whereupon they are furnished with a key. Even family members of such an individual are not entitled to the facilities of the parking space.

In view of the foregoing, the Frontier Parking Club is strictly private and in my opinion is not subject to the tax levied against similar, but public, enterprises.

I am addressing this letter to you at the suggestion of Mr. Geise and will be glad to call personally and discuss this matter with you."

Section 59-3.1 (d), of the Municipal Code of Chicago defines the term "Parking Lot" as follows:

"A premises, enclosure or other place where two or more motor vehicles are stored or parked for hire, not within a building, in a condition ready for use, where rent or compensation is paid to the owner, manager or lessee of the premises for the storing, sheltering, keeping or maintaining of such motor vehicles."

The term "public garage" is defined in section 156-13, "as meaning any building, structure, premises, enclosure or other place, except a public way, within the city, where two or more motor vehicles are stored, housed or parked for hire in a condition ready for use, or where rent or compensation is paid to the owner or lessee of the premises for the housing, sheltering, or keeping, or maintaining of such motor vehicles. * * *"

It will be noted that these definitions are identical, indicating the intention of the city council to make the regulations applicable to each class applicable to both. The council could hardly have intended to require the owner of a garage, which provides parking facilities to the general public for a consideration, to be licensed, while the owner of a parking lot providing similar parking facilities to a portion of the general public for a similar consideration, would be exempt from the licensing requirement.

It is our opinion that the Frontier Parking Club, notwithstanding its private and exclusive character, which maintains a parking lot where motor vehicles of a select group are parked for a price is a public garage and subject to the license provisions of the Municipal Code of Chicago.

CHAPTER VII—BUILDING AND ZONING

A. BUILDINGS

ICE STORAGE UNIT

(No. 11804—Commissioner, Department of Buildings—A. F. G.—
April 21, 1954.)

On April 12, 1954 you sent a letter from a law firm, inquiring if a portable ice vending station which was described in the letter would require a building permit to erect the same on a lot at 4747 S. Lake Park Avenue. In your note you make the same inquiry.

The attorneys describe the station as automatic and coin-operated. The dimensions of the station are 8 feet by 20 feet and the height approximately 8 feet. It will be erected on the ground on two 8 inch by 8 inch timbers. It is connected with electric power by means of a plug-in arrangement into a box located on an electric light pole. The station will be used for the storage and retail sale of ice.

We are advised that the ice is not manufactured in the unit but is made elsewhere and stored in the unit for sale. The electric connection is evidently for the purpose of operating a refrigerating unit to keep the stored ice frozen.

The term "building" is defined in Section 47-2 of the Chicago Building Code as: "A structure, or part thereof, enclosing any occupancy including residential, institutional, assembly, business, mercantile, industrial, storage, hazardous and miscellaneous uses * * *. The word 'structure' is not defined in the building code but is defined by Webster, as: 'something constructed or built, as a building, a dam, a bridge, especially a building of some size, an edifice.'"

There is little doubt if a building of the type and size described in the letter, and designed for the storage and sale of ice were to be built new on the proposed site, that such a building would require a permit for its erection.

Having seen that a station of the kind described, if erected new on a building site, would require a permit, would the fact that the station is prefabricated elsewhere, brought as a unit to the site and there erected in the same manner as a new structure exempt it from the permit requirement of the code. We do not believe so. If this were so many buildings of the size of this ice storage unit and larger could evade the permit requirements of the code. Real estate offices, office buildings for used car lots and parking lots could be fabricated away from the site, trucked to the site and erected thereon without benefit of permit.

One of the purposes of the requirement for permit for the erection of buildings and of application for licenses for certain occupations is to apprise the enforcing department of the erection of a proposed building and the existence of a business or occupation which may require a license, so that the department may enforce the provisions of the code applicable in each case.

It is our opinion, therefore, that the ice storage unit, described in the letter furnished this department, is a "building" within the meaning of the building code and requires a permit for its erection at the proposed location.

AUTHORITY TO DEMOLISH

(No. 11820—Commissioner of Buildings—G. D. W.—May 19, 1954.)

You request in your letter of May 5, 1954, for a legal opinion as to whether or not the following buildings located at 727 W. 65th Street, 6506 S. Emerald Avenue and 256 W. 61st Place can be wrecked by the Building Commissioner as a result of an ordinance passed by the City Council declaring such buildings to be a nuisance, and authorizing and directing the Commissioner of Buildings to demolish same.

The authorities on this subject are very clear and decisive. The Building Commissioner is merely a ministerial officer of the City and as such is not authorized to wreck a building pursuant to the passing of an ordinance even though this building is declared a public nuisance by such ordinance.

The only time a Building Commissioner has authority to wreck a building pursuant to an ordinance is when a decree has been entered by a court of equity. The court will not grant a decree authorizing the Building Commissioner the right to wreck a building unless the evidence is such that the building is structurally unsafe and dangerous to the community.

In the case of *People v. City of Chicago*, 280 Ill. 576, the court held that the power of the City to define and declare nuisances does not extend declaring anything to be a nuisance which is not a nuisance in fact.

In the case of *Wm. T. Nazworthy v. City of Sullivan, et al.*, 55 Ill. App. page 48, para. 6. "Abatement of nuisances: Where nuisances consist of the use of a structure, the law will not justify its destruction. The cause of the offense is alone to be removed."

It would seem from these authorities that the Building Commissioner must act, using his own discretion with reference to a specific ordinance declaring a building to be a public nuisance and requesting him to wreck same pursuant to such an ordinance.

The Building Commissioner is not bound by the ordinance unless the building is structurally unsafe or in such an irreparable condition that it constitutes a public danger and menace to the community.

If the City declares property to be a nuisance and destroys it, when, in fact, it is not a nuisance, the City is liable for the damages sustained by the owner. *Sings v. City of Joliet* (1908), 237 Ill. 300. And it has been held that officers seeking to justify their acts by authority of the City can do so only to the extent that the City might do so. *McQuillin on Municipal Corporations*. Volume 2 (revised), Page 374; *Wamesit Power Co. v. Allen*, 120 Mass. 352.

To obviate any question of the validity of the Council's definition or declaration of a nuisance, and to avoid the possible assertion of liability against the City and its officials, it would seem advisable, in cases other than those involving emergency situations created by buildings which have suddenly become so imminently dangerous to public health or safety as to require their immediate demolition, that resort should be had to a court of equity in order to accomplish the abatement of the nuisance by the razing of the structures.

In view of the above decisions, it is our opinion that suits for demolition should be started only in cases where the buildings are structurally unsafe or where the buildings are in such irreparable condition that they constitute a public danger and a menace to the community. To start suit in every single case where a building is merely open to vandals and needs repair is inadvisable from the standpoint of inviting law suits against the City of Chicago and its officers for damages.

TRUSTEE'S LIABILITY

(No. 11828—Committee on Building and Zoning—M. I. W.—June 15, 1954.)

At the June 8 meeting of the special joint committee of the Committees on Building and Zoning, Housing and Planning, the Corporation Counsel was asked to consider the provisions of the proposed revision of Chapter 39, relating to the liability of land trustees for violation of the building and fire codes in properties held in trust.

As passed by the committee a trustee with mere title and without the right of possession, management or control would be held liable for violation unless he filed with the court by way of a verified pleading or affidavit the name and last known address of the beneficiary of the trust at the time of the alleged violation, and the name of each person who may have been acting as agent for the purpose of managing, controlling or collecting rents as this information may appear on the trust records.

It is the opinion of the Corporation Counsel that this provision affords a means of avoiding liability that might leave the City without recourse in its effort to insure enforcement of the standards of health and safety as established by the ordinances of the City.

We have taken the position in the courts that responsibility cannot be divorced from ownership and that a penalty may properly be imposed on a trustee in cases of this sort and that the City need not be placed in the position of having to ferret out a hidden and often absent owner where open and notorious violations exist and the title-holder is before the court.

The realities of the situation are such that trustees are in a position to pass any liability imposed by the courts on to the real party in interest on whom the burden should, in the final analysis, rightly fall. Contractual agreements between trustee and beneficiaries may be and indeed are drawn to afford every protection to the fiduciary.

Conceding that the City's principal interest is in reaching the beneficiary, we see no objection to releasing a trustee where in a given proceeding the court has jurisdiction over the beneficiary. Short of that, we believe no immunity should be available.

It is, therefore, the recommendation of the Corporation Counsel that the provisions of the pending ordinance dealing with liabilities of trustees be amended so as to impose liability on a trustee unless the beneficiary shall have been served with summons or shall have entered a general appearance in the proceeding in question.

We are attaching a proposed motion to this effect for your consideration.

INSPECTION OF VENTILATING AND EXHAUST SYSTEMS

(No. 11837—Acting Commissioner of Buildings—J. C. M.—August 2, 1954.)

In your letter dated June 21, 1954, which was delivered to us on July 12, 1954, you request an opinion of this office in accordance with Section 12-20 of the Municipal Code of Chicago, which provides in part:

"in case of any difference of opinion between the said division marshal and the head of any other bureau or department of the city as to the correct interpretation of any provisions of this code, the question shall be submitted to the corporation counsel, whose duty it shall be to submit his opinion as soon as possible, and said opinion of the corporation counsel shall be final in all cases."

You state in that letter, in referring to a conference held in your office on June 10, 1954 relative to the Amendments passed by the City Council on May 11, 1954 (C.J. pp. 7442-7444) to Section 60-108 captioned "New Regulations concerning Grinding and Dust Producing Rooms in Hazardous Use Buildings," that:

"there was a marked divergence of opinion between the Chief of the Bureau of Heating, Ventilating and Industrial Sanitation and the Division Marshal in Charge of the Bureau of Fire Prevention, as to which bureau chief has the basic responsibility for taking the action in the procedures such as 'Approval of Plans,' 'Inspection of Premises and Structures,' 'Investigation of Complaints' and other activities, as well as the customary procedures made mandatory with reference to code violations."

One of the principal contentions of the departments involved is that the necessary skilled personnel has not been assigned to your department to carry out the inspections and adequate appropriations therefor have not been made.

We stated in an opinion rendered August 30, 1928 (Vol. 17 Opinions of Corporation Counsel, p. 240 at p. 243) on a similar subject:

"Under these circumstances it will be your duty to make the inspections required by the ordinance. If the force of inspectors you are able to employ under this appropriation is insufficient, the duty nevertheless remains to do the best that can be done with these men. If the work of inspection lags on account of a lack of inspectors, the City Council should be informed, to the end that an adequate appropriation should be made. But there is no more ground for failing to enforce the ordinance on account of an insufficient appropriation than there would be to fail to enforce the other building ordinances on account of a lack of men."

In the memoranda attached to your letter you have given many reasons why the Bureau of Heating, Ventilating and Industrial Sanitation should not be charged with the enforcement of the amendment to the Code.

Under the Health and Safety Act, Chapter 48 Illinois Revised Statutes 1953, the Industrial Commission is empowered to make reasonable rules for the protection to the lives, health and safety of employees in any occupation, business or enterprise in this State, other than those engaged in farming and coal mining.

Among the purposes for which the Commission is authorized to make rules are:

(a) The proper sanitation and ventilation of all places of employment to guard against personal injuries and diseases.

(b) The prevention of personal injuries and diseases by contact with any poisonous or deleterious materials, dust, vapors, gases or fumes.

By the fifth Section such rules have the force and effect of law.

The 17th Section of the Act makes it the duty of the Department of Labor to enforce the rules of the Industrial Commission promulgated by virtue of this Act. Definite directions are provided in this and the 18th Section as to the manner in which the Department of Labor shall enforce the rules.

The Industrial Commission has adopted rules as provided in this Act, among which are "Rules Relating to Removal of Dusts, Vapors, Fumes, or Gases from Grinding, Polishing and Buffing Operations".

In the Act preceding the present Health and Safety Act, it was provided that where ordinances of a municipality were of a standard equal to that of the Act, the inspection of the municipality would be accepted by the State Factory Inspector as a compliance with the provisions of this Act. In the present Act this provision was eliminated, evidencing an intention of the legislature to place solely in the hands of the Department of Labor the enforcement of the rules of the Industrial Commission for industrial ventilation and exhaust systems for the removal of dust, smoke and gas.

We are of the opinion, therefore, that the primary duty of making inspections and the enforcement of State rules for industrial ventilation and exhaust systems for removal of dust and dirt from grinding, polishing and buffing operations and the responsibilities incident thereto is reposed by Statute in the Department of Labor.

While the primary duty of making such inspections and enforcing the rules of the Industrial Commission rests with the Department of Labor of the State of Illinois, the Municipal Code of Chicago also requires inspections by the Building Department and the Department of Fire Prevention.

Section 1-9 of the Municipal Code of Chicago reads as follows:

"(h) *building provisions of this code*—all those chapters in the part of this code entitled 'Buildings' from 39 to 85, inclusive, and also chapter 89."

"(j) *fire regulations of this code*—chapters 90, 91 and 92 of this code."

Section 13-10 provides:

"The chief building inspector shall be in charge of all building inspections and shall enforce all building regulations of this code."

Chapter 12 of the Code, which creates the Bureau of Fire Prevention, provides in Section 12-20:

"Said division marshal shall have full power to pass upon any questions arising under the fire regulations of this code subject to the conditions, modifications and limitations contained herein."

Section 12-24 of the Code provides that the division marshal in charge of fire prevention, as to certain buildings containing hazardous units, "shall pass on all questions relating to the safety of life and property from fire. No permit for such buildings shall be issued until the said plans have been approved by the said division marshal and so stamped by him".

Section 12-25 of the Code provides for inspection of premises and structures by the division marshal and includes inspection for the protection of hazardous machinery, appliances and apparatus, combustible material, flammable liquids and explosives with regard to safety from fire.

The amendment to the Code that was passed on May 11, 1954 amends Section 60-108 and Sections 60-73 to 62-9.5 and provides that compliance with mechanical exhaust test requirements shall be determined in accordance with Sections 81-20 and 81-21. As we have noted above, these sections come within the building provisions of the Code as defined in Section 1-9 and the duty of enforcing Chapters 39 to 85 rests upon the chief building inspector. However, throughout the Code there are many references as to duties of department heads and it is sometimes difficult to determine whether the performance of one duty exempts the department from the performance of other duties provided for in the Code—all looking to one object—that is, the protection of the public and property.

It appears to us that inasmuch as the exhaust systems are provided by Section 60-108, the installations of which and the other factors set forth in that section are under the jurisdiction of the Building Department and the reference that mechanical exhaust tests shall be made in accordance with the requirements of Sections 81-20 and 81-21, the Code places in the Building Department the duty of making inspections to determine whether or not exhaust systems are properly and adequately functioning and to make the tests as provided by said sections.

Section 81-19 of the Code provides :

"The air inlets of every mechanical ventilating supply system and the air outlets of every mechanical ventilating *exhaust system shall be adjusted* to supply or exhaust the quantities of air prescribed with approximately uniform distribution over the entire area of such inlet or outlet."

Section 81-20 provides :

"Compliance with mechanical ventilating requirements shall be determined by readings indicating the velocity of the air in feet per minute; they shall be taken with a calibrated anemometer unless the conditions surrounding the installation are not within the range of accuracy of this instrument, in which case a Pitot tube, or other device approved by the commissioner of buildings shall be used. (Amend. Coun. J. 1-8-45, p. 2818.)"

Section 81-21 provides :

"Readings shall be taken at the openings, except where these are inaccessible or if accessible only at great hazard, and where the design or construction of the openings is such as to make it impossible to determine the free area."

Section 81-22 provides :

"Readings shall be taken by holding the anemometer close to the face of the opening and moving it at a uniform rate of speed over the entire surface of the opening. If the area of the opening is more than one hundred forty-four square inches and the velocity of air is not approximately uniform over the entire area, the opening shall be subdivided into equal areas, the longest side of which shall not exceed twelve inches and each subdivision shall be considered as an independent opening, and the average velocity of all of all of the subdivisions shall be considered as the velocity through the opening.

"If the openings are inaccessible or if accessible only at a great hazard or if the design or construction of the openings is such as to make it impossible to determine the free area, readings shall be taken over areas as hereinbefore described through handholes placed in the branch duct behind each opening or as close as practical to the opening."

Section 81-23 provides:

"The velocity readings as indicated by the anemometer shall be corrected to conform to the calibration curve for the instrument used."

Section 81-25 provides:

"The quantities of air supplied and exhausted through openings shall be determined by multiplying the area of each opening by the corrected reading of the anemometer or other instrument used.

"The sum of the quantities of air delivered at all openings of a system shall be considered the total capacity of the fan at the speed at which readings are taken."

Section 81-26 provides:

"Every ventilating system, either natural or mechanical, shall be kept in good repair and in operation so as to insure the required ventilation of all rooms and spaces to be ventilated thereby during all hours of human occupancy. No ventilating system shall be operated so as to cause objectionable drafts upon occupants."

All of these sections come under the jurisdiction of the Building Department and we are not in accord with the interpretation given by Mr. Aeberly in his memorandum to you when he says that in his opinion Sections 81-20 and 81-21 do not place upon the Building Department the duties therein set forth. According to his interpretation, if the exhaust or ventilating system is installed in accordance with the minimum requirements, no further action need be taken by the Building Department. The provisions of the Code above set forth cannot be ignored.

Section 101-29 provides that the Bureau of Fire Prevention shall make inspection of every hazardous use unit for which application for license has been made, and if such inspection shows compliance with the requirements of Chapter 51, the Bureau shall issue a certificate of compliance and approval. Chapter 51 refers to height and area limitations as applied to buildings or structures.

It is our opinion (1) that the Building Department has the responsibility of making periodical inspections of the exhaust and ventilating systems to determine whether or not they are in proper working condition, and (2) that it is the duty of the Fire Prevention Bureau, in connection with their other inspections to determine whether or not a fire or a safety hazard exists.

As we have said, the primary responsibility of making inspections is with the Department of Labor of the State of Illinois, but the secondary responsibility rests upon the Building Department and the Fire Prevention Bureau to see that all the provisions of the Code are properly complied with and violations enforced. We believe the Code provisions are explicit in this regard. Cooperation between the departments should make for better safety in eliminating damage and hazards.

PLUMBING CODE—PRE-EXISTING BUILDINGS

(No. 11882—Commissioner of Buildings—D. D. K.—Feb. 8, 1955.)

In your letter of January 14, you request our opinion as to the application of Section 78-10.3(d) and Section 66-3.1 of the Municipal Code to conditions found in "existing" buildings.

These sections read as follows:

78-10.3(d) "Every dwelling unit of more than one habitable room shall contain not less than one lavatory or sink, one bath tub or shower, and one water closet. Dwelling units with one habitable room shall

have access on the same floor to at least one public lavatory, one bath tub or shower, and two water closets. The water closets shall be in compartments separated for the use of each sex. There shall be not less than one fixture of each type mentioned in this paragraph for each twenty persons to be accommodated."

66-3.1 "(A) All habitable rooms in residential units shall be provided with means of natural ventilation as herein required, except kitchens having a floor area not exceeding eighty square feet.

"(B) All other rooms, including bathrooms, used or intended for human occupancy shall be provided with means of natural ventilation as herein required or shall have an approved system of mechanical ventilation complying with the requirements of Chapter 81, except as follows:

1. Natural ventilation shall not be substituted for mechanical ventilation in rooms or spaces where mechanical ventilation is specifically required in Chapter 81.

2. Natural ventilation or mechanical ventilation except where specifically required in Chapter 81 shall not be required in spaces occupied for infrequent and limited periods of time such as storage spaces, corridors and other circulation areas."

On April 23, 1945, in an opinion written to the Fire Commissioner (22 Op. Corp. Counsel 387, No. 10842), in considering the retroactivity of a building code provision, we wrote:

"The general principle of law applicable here is: Statutes and ordinances operate in the future only, and are never to be given a retrospective effect if susceptible of any other construction. An intention that a statute or ordinance shall have a retrospective operation is not to be presumed but must be manifested by clear and unequivocal language, and in case of doubt the statute or ordinance must be construed to have a prospective effect only. 43 Corpus Juris, Section 921."

The City Council embodied this principle of construction when it enacted Section 78-3(b), which reads as follows:

"Every existing building shall comply with the code requirements in force and applicable to such building at the time of its construction or alteration and shall also comply with such provisions of this code which are *specifically made applicable* to existing buildings." (Emphasis ours.)

Now let us examine the scope or applicability of Section 78-10.3(d). Section 78-1 of the Municipal Code reads as follows:

"Every existing building, structure or part thereof shall comply with the requirements of this chapter."

The language in this particular section would appear to make the whole of Chapter 78 apply to all existing buildings. However, Section 78-10.3(d) is but a sub-section and part of Section 78-10.3, which section specifically limits its application as follows:

78-10.3. "Any residential unit *altered or converted under the provisions of this chapter* shall comply with the provisions of Chapter 66, except as provided in this section". (Emphasis ours.)

The code then goes on to list five (5) exceptions, all of which, it will be noted, are less stringent in their requirements than the comparable provisions of Chapter 66. One of these exceptions is Section 78-10.3(d), which sets up a lesser requirement for plumbing facilities than does Chapter 66.

It is our opinion that the manifest intent of the City Council in enacting Section 78-10.3 was that it apply only to existing buildings which have

been altered or converted since the date of the adoption of this ordinance. Further, the Council intended that even in the case of an alteration or conversion of an existing building, certain requirements should not be as strict as those applicable to a new building erected after the effective date of this ordinance.

We conclude then, that Section 78-10.3(d) does not apply to existing buildings, but only to buildings altered or converted since this ordinance became effective.

Similar reasoning is applicable to Section 66-3.1. To begin with, nothing in Chapter 66 specifically states that the provisions of that chapter shall apply to existing buildings. And so, under the controlling rule of construction above cited, this chapter does not so apply. Further, the mere fact that Section 78-10.3 refers to and lists certain exceptions to Chapter 66, patently implies that the provisions of Chapter 66 are *not* applicable to existing buildings.

From the foregoing discussion, it is clear that unless it can be shown that the building in question was erected, altered or converted subsequent to the enactment of Sections 78-10.3(d) and 66-3.1, the standards set in these sections cannot be applied to existing buildings.

This conclusion does not leave us without any regulatory standard for ventilation or sanitary facilities. Section 78-3(b) above cited, expressly sets the standard as that in effect at the time of the building's erection or alteration.

In a great number of cases involving existing buildings wherein building code violations are suspected, it may very well be that the conditions which are found constitute a violation even under the requirements applicable at the time of the building's erection or alteration. In many instances, these older requirements are substantially as strict as those of our present code.

In some cases, resort may also be had to Section 99-4 which reads as follows:

"No building, vehicle, structure, receptacle, yard, lot, premises or part thereof, shall be made, used, kept, maintained, or operated in the City, if such use, keeping, maintaining, or operating shall be the occasion of any nuisance or shall be dangerous to life or detrimental to health."

The above section seems to stand on its own. It is not a part of the building code and would appear to apply to all existing public nuisances.

ELECTRICAL WORK BY HOME OWNER

(No. 11899—Chief Electrical Inspector—E. W. P.—April 21, 1955.)

We have your letter, dated April 20, 1955, in which you advise that the Bureau of Electrical Inspection wishes to know the Section of the Statute, if any, which provides that a home owner may do electrical wiring in his own home.

Chapter 24—Cities and Villages Act of the Illinois Revised Statutes, Section 37-1-4, both inclusive, deals with the definition of electrical equipment, grants power to the municipality by ordinance to regulate the installation, alteration, and use of all electrical equipment and sets forth the standards, the power of the municipality to issue permits, and collect fees, and to impose penalties. Amongst these provisions, the electrical commission of the municipi-

pality is empowered to recommend safe and practical standards and specifications for the installation, alteration and use of the electrical equipment designed to meet the necessities and conditions of the particular locality, and which further provides that no electrical equipment shall be installed or altered, except upon a permit first issued by the department. There is no provision in the Statute which exempts a home owner from compliance with the applicable Municipal Code.

Chapter 86, Sections 47 to 54, both inclusive, provide for the issuance of maintenance permits for the installation, alteration, repair and maintenance of electrical wires and apparatus where such electrical work is to be performed in or on the premises or property owned or controlled by the applicant, but also provides that it is mandatory that such a person shall appoint or employ a supervising electrician as provided for in Section 86-20, and the qualifications for the supervising electrician are set forth in detail in Section 86-22 of the Code.

It is, therefore, our opinion that a home owner must comply with the pertinent provisions as set forth before he may do any electrical wiring in his own home.

GASOLINE TANK IN HOTEL GARAGE

(No. 11967—*Director of Administration, Department of Buildings—*
A. F. G.—October 19, 1955.)

We have your letter of October 10, 1955 with which was enclosed a letter from attorneys representing the garage tenant at 5815 N. Sheridan Road. You ask to be advised if you can issue a permit for a tank for the storage of flammable liquid or gasoline.

The attorneys' letter requests a tank permit for the storage and sale of inflammable liquid or gasoline. They state that the tank in said premises was originally installed when the building was built several years ago, apparently, without a permit. The letter then goes on to say:

"We have had some litigation and other action in connection with this matter. The consensus of opinion of all concerned was that if the requisite frontage consents were obtained, your Department would presently issue said permit, and thereby remedy the initial oversight or error in failing to obtain such permit. We have obtained and deposited with you said requisite frontage consents. The garage in said premises is a private garage, catering solely to the tenants in said premises. There are no garage or gasoline signs displayed anywhere therein or thereon. The building is of fire proof construction, and said tank installation and the sale of gasoline thereon to the tenants do not constitute a fire hazard, and the fire department has no objection thereto.

There are many other new buildings recently constructed along the 'Drive' which contain similar garages, and sell gasoline to the tenants living therein; some of these garages, among other, are:

880 Lake Shore Drive; 1350 Lake Shore Drive; 2933 Sheridan Road; 3101 Sheridan Road; 3270 Lake Shore Drive; 3410 Lake Shore Drive; 5555 Sheridan Road; 6030 Sheridan Road.

We are informed that the requisite tank permit and license permitting the sale of gasoline has been issued by your Department for the garage operation in the premises at 4950 Marine Drive.

In view of the above, we request that our application for such permit and license be approved, and the same issued forthwith."

Section 59-3.1(a) of the Municipal Code of Chicago defines the term "garage" as follows: "A building or part of a building designed or used for the display, shelter, storage or servicing of motor vehicles, containing flammable fuel and having a floor area exceeding 800 square feet".

Section 156-13 of the said code reads as follows: "The term 'public garage' as used in this chapter is hereby defined as meaning any building, structure, premises, enclosure, or other place, except a public way, within the city, where two or more motor vehicles are stored, housed or parked for hire, in a condition ready for use, or where rent or compensation is paid to the owner, manager or lessee of the premises for the housing, storing, sheltering, keeping, or maintaining of such motor vehicles. * * *".

Section 156-15 provides that no person shall engage in the business of public garage without first having obtained a license therefor.

Section 127-1 of the said code reads as follows:

"The term 'filling station' as used in this chapter is hereby defined as meaning any building, structure, premises, enclosure, or other place within the city where a container or containers, tank or tanks, either portable or stationary, and containing ether, carbon bisulphate, gasoline, naphtha, benzole, hydrocarbon (gas drips), liquefied petroleum gas, acetone, kerosene, turpentine, or other flammable liquids having a flash point below 165 degrees Fahrenheit, are kept or located for the purpose of selling, offering for sale, or distribution any such liquids from such container or tank: * * *".

Section 127-2 provides that no person shall engage in the business of a filling station without first having obtained a license therefor.

The building in question is located in an apartment house district under the Chicago Zoning Ordinance. The permit requested by the owner for the installation of flammable liquid tanks for the storage and sale of gasoline would make the premises a "public garage" and a "filling station" under the definitions cited above, neither of which is a permitted use in an apartment house district under the said zoning ordinance.

Realizing that the proposed installation was in violation of the zoning ordinance the owner of this building on September 27, 1954 filed an application for a variation under the zoning ordinance to permit the installation of four 1000 gallon tanks for the storage and sale of gasoline in the basement of the said building. After a public hearing held November 1, 1954 the Board of Appeals, after having fully heard the testimony and arguments of the parties, found that in this case no facts were presented which, in its judgment, would justify it in granting the variation, and recommended to the city council that the application be denied.

The attorneys in their letter furnish you a list of seven buildings on Lake Shore Drive and Sheridan Road which they allege contain similar garages and sell gasoline to the tenants living therein. They also claim that tank permits and license to sell gasoline have been issued by your department for the garage operation in the premises at 4950 Marine Drive.

You have advised us that none of the seven buildings referred to has been granted a permit or license and hence is illegally operating. You also state that the building referred to on Marine Drive was inadvertently issued a tank permit and a license for the sale of gasoline, in violation of the zoning ordinance.

In the case of the seven buildings being operated in violation of the zoning ordinance, you should follow the usual procedure provided for in such cases. In the *Marine Drive* case you should request the Mayor to revoke the permit and license improvidently issued. No right accrues to a person who obtains a license that was improvidently issued in violation of an ordinance. The rule which governs in such cases is that the person who obtains the

license is bound to take notice of the ordinances, and if the official who issued it exceeded his authority or issued it by mistake, the mere issuance of the paper purporting to confer the license carries no right with it and imposes no obligation on the City (Opinions of the Corporation Counsel Vol. XVII, p. 575).

Therefore, in answer to your question, it is our opinion you have no right to issue a permit for a tank for the storage of flammable liquid or gasoline in violation of the zoning ordinance.

Ed. Note: See *Sheridan Shores Inc. v. City of Chicago*, 13, Ill. App. 2d 377.

PRIORITY OF LIEN FOR DEMOLITION COSTS

(No. 11968—Commissioner of Buildings—J. P. M.—October 19, 1955.)

In your letter of October 4, 1955 you request an opinion as to priority of a lien for costs incurred by the Building Commissioner for wrecking a building under a court order; please be advised that the Cities and Villages Act, Chapter 24, Section 23-70.2 of the Illinois Revised Statutes provides:

“* * * The cost of such demolition, repair or enclosure shall be recoverable from the owner or owners of such real estate and shall be a lien thereon, which lien shall be subordinate to all prior or existing liens and encumbrances * * *”.

Under the above section it seems to follow that the lien of the Building Commissioner will take priority in the order in which it is recorded, subject to all liens of prior recording. The lien could become a first lien only by release of any prior recorded liens. The Chicago Title & Trust Company would issue a title policy on the property subject to the lien or liens of record.

The lien of the Building Commissioner may be enforced by proceedings to foreclose as in the case of mortgages or mechanics liens. The suit must be commenced within three years after the date of filing notice of the lien.

THEATRE FIRE CURTAIN

(No. 12000—Commissioner of Buildings—A. F. G.—January 16, 1956.)

Your letter of December 27, 1955 reads as follows:

“A precedent was established two and one-half years ago wherein the Palace Theatre was granted permission verbally, otherwise not official, to temporarily fasten the proscenium opening curtain in order to install the Cinerama wide screen projection. There is no indication that this installation will be other than a permanent operation, as it has been in effect for two and one-half years.

We are now confronted with a similar problem wherein McVickers Theatre has also fastened up and made inoperative their proscenium fire curtain in order to install what is known as the Todd-AO projection.

The active tying up of this curtain is in violation of Municipal Code's Sections 54-6.5 and 54-8.3, both of which refer to the operation of the fire curtain and the blocking of exits.

Serious consideration should be given to this matter because it is apparent that there will be increased requests for other theatres to do similar installations. This Department is in no position to permit this matter to grow without having ordinances to cover the conditions.

In like manner we respectfully request an opinion from you regarding installations at the McVickers Theatre and the Palace Theatre as they now stand."

Section 54-6.1. Definitions, defines the term "Stage" as:

"a) Stage.

The space in a theater or assembly room separated from the auditorium equipped for theatrical or similar performances that provide for the use of curtains, portable or fixed scenery, lights, or mechanical appliances.

Recesses at the front of an auditorium used or designed solely for the mounting of a motion picture screen and its required sound equipment containing no fixed or movable scenery other than curtains of flame-resistive material shall not be deemed to be a stage under the requirements of this section."

A Type 2 Stage is defined in the same section as a stage located in a school, church, community building, club or similar occupancy in which the use of the stage for theatrical productions is occasional. The capacity of such assembly rooms shall not exceed 1,000 persons.

A Type 1 Stage is every stage other than a Type 2 Stage as defined above.

When the two theatres referred to in your letter abandoned the use of their stages for theatrical purposes and substituted screens for the showing of motion pictures, the space formerly so used can no longer be deemed to be a Type 1 Stage under the second paragraph of paragraph (a) quoted above, and the construction requirements of Type 1 Stages provided for in section 54-6.2 can no longer be required in such space. However, our code does not seem to have provided for fire protection of the proscenium opening where such a conversion has taken place.

If the type of motion picture screen which has been substituted for the Type 1 Stage is such that it does not interfere with operation of the proscenium fire curtain we see no reason why, if the curtain is maintained in a permanently lowered position that it would not offer the necessary fire protection. On the other hand, if the type of construction of the screen is such that it will not permit the permanent lowering of the fire curtain, some other form of fire protection should be provided for the proscenium opening.

We suggest two sections of the code be amended to provide this protection. A new paragraph (f) to be added to section 54-6.5 which provides requirements for proscenium fire curtains, Type 1 Stages, to read as follows:

"(f) Where a Type 1 Stage in an existing Assembly Unit has been abandoned for theatrical or similar performances, and the recess at the front of the auditorium is designed and used solely for the mounting of a motion picture screen and its required sound equipment and contains no fixed or movable scenery, the requirements of this section shall not apply. The proscenium fire curtain may be removed or if practical to do so, may be kept permanently in a lowered position. If it is not practical to keep the fire curtain permanently in a lowered position, the proscenium opening shall be protected by a hour fire resistive enclosure."

Also a new paragraph (e) substantially like the foregoing be added to section 78-9 which provides special requirements in existing Assembly Units.

If these suggested amendments meet with your approval or if you have amendments which will more effectively accomplish their purpose, we shall be pleased to put them in ordinance form.

Ed. Note: See 54-6.5(f) Amend. Coun. J. 5-28-58.

BUILDING PERMIT ON PROPOSED IMPROVEMENT SITE

(No. 12011—Commissioner, Department of Buildings—E. R. F.—February 7, 1956.)

We are in receipt of your letter of January 13, 1956, in which you state that certain procedures relating to the issuance of building permits on properties within the area of proposed superhighways and in effect for the last two years, have met with objections from the Cook County Highway Department who request that all building permits be denied when in such an area.

These procedures required an affidavit by an applicant reciting his awareness of the proposed public improvement and his submission of such an affidavit was a condition precedent to the issuance of a building permit.

The office of the Commissioner of Buildings was created to enforce building restrictions imposed by the laws of the State of Illinois and ordinances of the City of Chicago, and the Building Commissioner has no discretion whatsoever to refuse a permit to erect any structure upon private property which complies with the building code (Municipal Code of Chicago—Chap 43).

Restrictions against the use of private property in the area of a proposed superhighway might have the effect of depriving an owner of the enjoyment or profit to be derived therefrom and constitute a "taking" for public use without making just compensation.

Title to property to be acquired under Eminent Domain authority granted to the City of Chicago, vests only from the date of the filing of the Petition to Condemn and the fair market value is fixed on that date.

(*Department of Public Works and Buildings v. Wolf*, 414 Ill. 386 (1953)).

(*City of Chicago v. McCausland*, 379 Ill. 602 (1942)).

(*People ex rel Harding v. Atwater*, 362 Ill. 546 (1936)).

(*Chicago Park District v. Downey Coal Co.*, 1 Ill. 2nd 54 (1953)).

There need not be an actual physical taking, but any destruction, restriction or interruption of the common and necessary use and enjoyment of property in a lawful manner may constitute a taking for which compensation must be made (20 Corpus Juris, 566).

We can find nothing to justify a refusal of a building permit when proper application is made.

**BUILDING CODE APPLICABLE TO CHICAGO
PORT AUTHORITY**

(No. 12027—Commissioner of Buildings—A. F. G.—April 6, 1956.)

Your letter of March 21, 1956 is as follows:

"There is some question with reference to issuance of building permits and the payment of permit fees in areas under the jurisdiction and control of the Chicago Regional Port Authority.

We would appreciate an early opinion concerning the Department's obligations for the examination of plans, the issuance of permits and the inspection of all premises under this Authority's control."

The Chicago Regional Port District is a political subdivision, body politic and municipal corporation, created by an Act, entitled "An Act to create a Chicago Regional Port District and to define its powers and duties." Approved June 6, 1951 (Pars. 152 to 178, Chap. 19, Ill. Rev. Stats. 1955).

The area of operation of the District embraces all of townships numbered 36 and 37 on the United States Government Survey, situated in Cook County, and section 14 in township 37, range 11, situated in DuPage County, Illinois. Township 37 is partly in the city of Chicago. The District may sue and be sued in its corporate name.

Among the rights and powers vested in the District by section 5 (e) of the said Act is:

"To acquire, own, construct, lease and maintain port and water terminal facilities and subject to the provisions of Section 5.01 to operate or contract for the operation of such facilities. * * *

"Terminal facilities" as defined in the Act "means all lands, buildings, structures, improvements, equipment and appliances useful in the operation of public warehouse, storage and transportation facilities for water commerce."

No police power has been expressly or impliedly granted to the District, such as has been expressly granted to municipalities by sections 23-70 and 23-71 of the "Revised Cities and Villages Act", to prescribe the thickness, strength and manner of constructing all buildings and of the construction of fire escape thereon", and "to cause all buildings and enclosures which are in a dangerous fire condition to be put in a safe fire condition."

There is a distinction between municipal corporations proper, such as exist by charters issued by the State, as incorporated cities, villages and towns voluntarily organized under the general Incorporation Act, and corporations such as counties, townships, school districts, park districts, and districts like the one here in question, which are frequently referred to as involuntary *quasi* corporations. Municipal corporations are those called into existence either at the direct request or consent of the persons composing them. *Quasi* municipal corporations, such as those enumerated above are at most but local organizations, which are created by general law without the consent of the inhabitants thereof for the purpose of the civil and political administration of government and they are invested with but few characteristics of corporate existence (*County of Cook v. City of Chicago*, 311 Ill. 234) (1924).

In the case just cited the principal question argued in the case was whether or not the city council has power to require an observance of its fire regulations by the county in the building of a county jail. The court found there was no delegation of police power to the counties and townships of the State, that the legislature by statute had conferred on municipal corporations such as cities, villages and incorporated towns, the police power to prescribe fire regulations and to regulate buildings within their limits in respect to fire protection.

In holding that the police power delegated to the City must be construed as between the County and the City, as a delegation of power to the latter which the former is expected to observe, the court said at page 248:

"We are of the opinion that in enacting paragraph 63 of Article five of the Cities and Villages Act (now section 23-71), and in using

the language, 'and to cause all such buildings and inclosures, as may be in a dangerous state to be put in a safe condition,' the legislature intended to confer upon the city council such power over all of the buildings erected within the city as the words there indicate, including those of the county or other municipalities located therein."

This office has held in the opinions cited below, that buildings erected in parks under the jurisdiction of the Chicago Park District, and buildings erected in its area of operation by the Medical Center District were subject to the structural and other requirements of the building code of the City of Chicago and to the permit fees provided therein (Opinions of the Corporation Counsel Vol. 19, p. 73, and Vol. 22, p. 416).

The Chicago Regional Port District is a *quasi* municipal corporation of the same general character as the two districts above referred to, and like them has been granted no police power to regulate the construction of buildings, such as has been given to the City of Chicago.

In conformity with the decision of our Supreme Court in the Cook County case cited above and our opinions in the other cases referred to we hold that the Chicago Regional Port District, in the erection of buildings it is authorized by law to erect, is subject to the payment of the fees for building permits and required to comply with all of the regulations of the building code of the City of Chicago.

EAVES INCLUDED IN "GROUND AREA"

(No. 12030—Commissioner of Buildings—J. P. M.—April 16, 1956.)

We acknowledge your recent letter requesting an opinion as to whether the eaves of a building are to be included in determining the ground area of a building.

Please be advised that Section 2 of the Chicago Zoning Ordinance defines ground area of building as "The area of ground bounded by lines projected to include all walls, bays, balustrades, belt courses, cornices, fences, fire escapes and other fixtures * * * extending more than 4 feet above the finished grade of the land area and all uncovered spaces more than 4 feet above the finished grade of the land area which are not open to a public way."

From the above definition, it would seem to follow that the definition of the ground area of building would include the eaves of a building.

Section 18(d) of the Chicago Zoning Ordinance provides as follows:

"No part of the ground area of a building in a Family Residence or Duplex Residence district shall be nearer to the side lot lines than 3 feet or 10 percent of the width of the lot, piece or parcel, whichever is greater, excepting where the side lot line adjoins a public way."

If the property in question is in a family residence or duplex residence district and the ground area of the building, which includes the eaves, is within 3 feet or 10 percent of the width of the lot then it is the opinion of this office that a violation of Section 18(d) exists.

PRIVATE SWIMMING POOL

(No. 12041—Commissioner of Buildings—A. F. G.—June 7, 1956.)

In your letter of May 29, 1956. Re: Private Swimming Pools you say:

"On May 18, 1956, the Department of Buildings received a complaint that an outdoor swimming pool was being installed at 4812 South Greenwood Avenue, in connection with a private residence without a permit having been secured.

Inspections made on May 21 disclosed that an excavation had been made for the purpose of installing an out-door swimming pool and that no permit had been secured. Accordingly, under date of May 22 and 23, 1956, the owner, Dr. Harsba Bowyer, 4812 South Greenwood Avenue, and the contractor, Holiday Pools, Inc., 4847 West Chicago Avenue, were notified to submit plans to the Department of Buildings for approval and obtain building and plumbing permits for the erection of new swimming pool in accordance with sections 39-4, 43-1, and 82-3 of the Municipal Code of Chicago."

You state that the company installing the pool has furnished you complete information concerning the size, construction and manner of operating the pool. You also state that:

"The Municipal Code of Chicago contains no specific regulations pertaining to the installation, operation, and maintenance of private swimming pools intended for use of owners, their families and friends only. The construction and operation of such pools present problems related to zoning, construction features with reference to the pool, the water piping systems, sanitary control and safety features. The need for requiring the installation of a fence or enclosure to preclude the possibility of children and adults from falling into an unprotected pool must also be given consideration. The ordinances now in effect are inadequate to govern the situation."

* * * * *

"Although there are no specific regulations governing the construction of private swimming pools, we feel justified in stopping construction work based upon the provisions of sections 39-4, 43-1, and 82-3 of the Municipal Code of Chicago. Such action subjects the contractor to curtailment of activities and may lead to possible law suits. The problem, therefore, is one requiring immediate consideration and action, both as to the course of action to be followed based upon those ordinances now in effect, and the formulation and enactment of an ordinance to govern design, construction and maintenance of swimming pools installed in connection with private residences."

You ask your opinion on the following:

- "(a) What action we should take with reference to requiring the submission of plans and applications for permits for the construction of swimming pools intended to be installed in connection with private residences, and based upon those ordinances now in effect, both from zoning and construction standpoints?
- (b) What action is advisable for the promulgation of suitable ordinances pertaining to the design, construction, maintenance and operation of swimming pools intended for installation in connection with private residences?
- (c) Whether or not the State of Illinois Department of Public Health should be involved in the problem?

- (d) Are we legally justified in our refusal to issue permits for the construction of private swimming pools based upon the information presented in this letter? Although at the present time there are no specific ordinances pertaining to the design, construction and maintenance of swimming pools intended for installation on private residential property, we recognize the need for such regulations in the interest of protecting the life, limb and health of persons. Therefore, it is our belief that pending the enactment of such legislation, we should not issue permits for the construction and installation of such type swimming pools and their appurtenances."

All legislative power in municipalities is vested by the Legislature in the city council. It is the duty of the commissioner of buildings to enforce the regulations of the ordinances enacted by the city council. From your letter it would appear that you wish to impose regulations for private swimming pools, which you think the city council should have provided. If the city council had provided regulations which you deemed inadequate, you certainly would have no authority to impose different or stricter requirements.

Answering your specific questions:

"(a) The purpose of requiring applicants for permits for buildings or structures to submit plans is to show your department that the plans for construction conform to the requirements of the ordinance. Where, as here, no regulations are provided in the ordinance it would appear idle to submit plans.

"(b) We advise you to prepare the regulations you believe necessary for private swimming pools and submit them to the city council for action by that body. If you send us these regulations we shall be pleased to put them in proper ordinance form for such submission.

"(c) We do not believe the State Department of Public Health should be involved in this problem.

"(d) The owner of property has the right to use his property subject to such reasonable regulations as may be imposed by ordinance. Here the owner desires to place a private swimming pool on his residence property for which installation the city council has provided no regulations. You feel there should be regulations for this type of structure, but you have no legal right to impose regulations upon the use of property which under the law is a proper legislative function of the city council. Until that body has made such provisions, we are of the opinion the owner is entitled to make such installation."

In the case of *Plander v. Kochler*, 150 N. Y. S. 2nd 879, recently decided by the Supreme Court of New York, involving the refusal of a building inspector to issue a permit to construct a cement building block plant in an industrial district, a permitted use in such a district. The refusal was based on the grounds, (1) there would be an undue burden placed upon the area because of traffic conditions, and (2) that the type of industry is not conducive to the best interest of the public welfare in the area in which the application is made. In denying the right of the building inspector to refuse the permit the court said:

"It has been held that the administrative official charged with the duty of issuing permits is bound by the provisions of the ordinance to which he purports to act (citing cases), and a refusal to issue a permit upon a ground other than one which comes within the scope of the building inspector's authority as spelled out by the ordinance constitutes an arbitrary act (*Carpenter v. Grab*, 12 N. Y. S. 2nd 906).

Ordinarily the issuance of a building permit is purely an administrative act, and the person charged with its issuance must follow the

literal provisions of the zoning ordinance. He is circumscribed by their provisions and absent some cogent reason based on the wording in the ordinance, the granting is required as a matter of course. The granting or withholding of a permit is not a matter of arbitrary discretion. If the applicant complies with the requirements of the ordinance he is entitled to his permit." (Citing cases.)

We think you should issue a permit.

NUISANCE—AIR CONDITIONING UNIT

(No. 12048—Chief Inspector, Dept. of Inspection of Steam Boilers, etc.—J. R. B.—June 19, 1956.)

In your letter of recent date you request our opinion in regard to the noises made by window air conditioning units and whether such units could be classified as a nuisance.

You state that upon investigation by your department, in most cases the units were practically new, well supported in the window and there was no undue vibration; and in no case did they extend beyond the property line.

Please be advised that Section 99.4 of the Municipal Code of Chicago provides as follows:

"No building, vehicle, structure, receptacle, yard, lot, premises, or part thereof, shall be made, used, kept, maintained, or operated in the city, if such use, keeping, maintaining, or operating shall be the occasion of any nuisance, or shall be dangerous to life or detrimental to health." (Amend. Coun. J. 12-1-50, p. 7234.)

Any person using his premises in such a fashion that it would constitute a nuisance would be in violation of said section and could be prosecuted for such a violation.

A window air conditioning unit is not a nuisance per se but might become a nuisance by reason of its location and operating condition.

We are, therefore, of the opinion that there cannot be a general classification of window air conditioning units as nuisances. Each case must be considered separately and you should be guided by the facts in each given situation when you are called upon to pass judgment on these questions.

PUBLIC INSPECTION OF RECORDS

(No. 12064—Department of Buildings—A. F. G.—August 8, 1956.)

Your letter of August 1, 1956 is as follows:

"Enclosed is copy of an opinion rendered by your office in 1944, concerning entitlement of the public to search the records of the Building Department.

Inasmuch as changes have been made in Chapter 13 since the rendering of this opinion, will you please advise us as to the rights of the public to inspect the records of the Department of Building?"

In our opinion of 1944, copy of which was enclosed with your letter, we quoted part of section 13-27 of the Municipal Code of Chicago, which

section required the commissioner of buildings to keep certain records, which were to be kept open at all times to certain designated city officials and to members of the city council. This section of the code has been repealed. The records you now keep are not official records in the sense that they are required to be kept by virtue of some provision of the ordinance, but are kept for the orderly administration of the business of the department.

The last paragraph of your letter indicates the belief that the repeal of the provision in chapter 13, in some way modifies the conclusion reached in the 1944 opinion.

In the 1944 opinion in discussing the right of the public to the inspection of records we said: "The right to inspect in any event is limited to records and documents as the law requires the officer to keep". With the repeal of the section of the code requiring certain records to be kept, we are of the opinion that the conclusions reached in the 1944 opinion are more applicable now than they were prior to the said repeal.

STORAGE TANK FOR PROPANE GAS

(No. 12067—Commissioner of Buildings—J. C. M.—August 23, 1956.)

We have before us your letter dated July 17, 1956, in which you request our opinion with reference to the applications submitted by Peoples Gas Light and Coke Company for proposed installation of 40 additional propane tanks, 30,000 gallons each, or 1,200,000 gallons at each of the two locations, 3500 S. Pulaski Road and 3200 E. 98th Street, Chicago, Illinois.

You advise that at the Calumet Station of Peoples Gas Light and Coke Company, 3200 E. 98th Street, there is an existing installation of 8 propane gas tanks, 30,000 gallons each, a total of 240,000 gallons, and 33 propane gas tanks, 15,000 gallons each, a total of 495,000 gallons, making a grand total at this location of 735,000 gallons.

You also advise that the Crawford Avenue Station, known as 3500 S. Pulaski Road, Chicago, Illinois, has existing installation of 34 propane gas tanks, 20 of them with 30,000 gallons capacity each, a total of 600,000 gallons, and 14 tanks each of them 15,000 gallons capacity, a total of 210,000 gallons, making a grand total on the Pulaski Road location of 810,000 gallons.

There was enacted a statute, Ill. Rev. Stats. of 1955, approved July 11, 1955, Chapter 104, entitled "Oil and Gas", Sections 119 through 121, which provides as follows:

"119. Definition.) 'Liquefied petroleum gases' means any material which is composed predominantly of any of the following hydrocarbons, or mixtures of them: propane, propylene, normal butanes, ice-butanes and butylenes.

"120. Endangering life and Property Prohibited.) It is unlawful for any person to keep, store, transport, sell or use any liquefied petroleum gases in such manner or under such circumstances as will jeopardize life or property.

"121. Rules and Regulations.) The Department of Public Safety has power to make, adopt and enforce rules and regulations governing the keeping, storage, transportation, sale or use of liquefied petroleum gases. Such rules and regulations shall be in substantial conformity with the generally accepted standards of safety concerning the same subject matter. Rules and regulations in substantial conformity with

the published Standards of the National Fire Protection Association for the Storage and Handling of Liquefied Petroleum Gases and with the published Recommended Good Practice Rules for Liquefied Petroleum Gas Piping and Appliance Installations in Buildings as recommended by the National Fire Protection Association, shall be deemed in substantial conformity with the generally accepted standards of safety. No municipality or other political subdivision shall adopt or enforce any ordinance or regulation in conflict with the provisions of this Act or with the regulations promulgated under this Section."

As you will note from the Statute, no ordinance or regulation of a municipality shall be in conflict with the Statute and regulations promulgated.

We have examined the provisions of the Code and the regulations promulgated under the Statute.

Section 22 of the NBFU No. 59 Standards (National Board of Fire Underwriters, National Fire Protection Association) provides that storage containers of any of the liquefied petroleum gases shall not exceed 30,000 standard U. S. gallons water capacity. Section 60-53 of the City Code relating to capacity is in conflict with the above regulation in that greater tank capacities are allowable. The State regulation shall control.

Section 251 of the State regulation requires that there be 100 feet clearance, where 6 or more containers are installed, from buildings, etc. Section 60-53 of the Code sets 30 feet clearance as the standard in the use or capacity tanks of 20,000 to 200,000 gallons. The State regulation shall control.

Section 255 of the State Standards provides:

"255. In cases where containers are to be installed in heavily populated or congested areas, the authority having jurisdiction shall determine restrictions of individual tank capacity, total storage, distance to line of adjoining property which may be built on or otherwise protective methods."

Under the law, the municipality can make regulations more stringent than those of the State but cannot make regulations less stringent than those of the State.

You have projected your concern as to the nearness of the proposed tanks to (1) the Calumet Skyway and (2) to the residential area surrounding the Crawford Avenue Station. We have examined the plans approved by the Department of Public Safety of the State of Illinois on August 16, 1956 under the Statute and State regulations and find that the locations of the tanks provide greater clearances than required by the City Code and State regulations.

Section 60-52 of the Municipal Code of Chicago pertains to "*above ground tanks*" and contains a provision:—"The total capacity of tanks in any storage yard for the storage of Class I, II and III flammable liquids shall not exceed seven hundred fifty thousand gallons." Section 60-53 of the Code relates to "maximum capacity of tanks for underground storage." At first glance it would appear that the 750,000 gallon limitation would be the maximum under any circumstances, but, when the two sections of the Code are considered, the controlling section as to underground tanks is Section 60-53. It allows unlimited capacity where there is a clearance of 50 feet or more, for installation of underground tanks. The specific provision would control over the general provision, even if the general provision contained in Section 60-52 was applicable.

During the conference that was held in this office on August 22, 1956, we discussed all of the pertinent code provisions and concluded that our code provisions should be amended by adopting more stringent regulations that would confine the storage of propane gas within the City of Chicago

to one tank of a limited gallonage, thereby eliminating large storage areas of such gas. However, under the present code, we are of the opinion that the Peoples Gas Light and Coke Company is entitled to permits for the installation of tanks as indicated on the plans approved by the State. The Peoples Gas Light and Coke Company, of course, will have to comply with other provisions of the State and City regulations as to type of material, method of installation, etc.

MORTGAGEE'S LIABILITY FOR ILLEGAL CONVERSION

(No. 12068—Commissioner of Buildings—L. A. W.—August 24, 1956.)

Mr. James V. Fitzpatrick of your office recently inquired as to the feasibility of holding a person who advances money to a property owner for an illegal conversion or alteration of a building responsible for such a violation.

Accordingly we made a study of this problem and found that in many instances some unscrupulous contractors contact owners of buildings and recommend the erection of an apartment in a basement or in an attic, suggesting to the owner that the property would bring in additional income. These contractors arrange a junior mortgage, guaranteed by the Federal Housing Administration. The lender, therefore, risks very little as the money advanced by him is guaranteed under Title one of the Federal Housing Act dealing with home improvements and, therefore, they seldom inspect the property involved or the purpose for which the money is advanced.

An examination of several such contracts discloses that in the fine print there is a provision to the effect that the owner of the property agrees to provide the necessary City building permits. This provision sometimes absolves the contractor from liability and throws the entire burden of the illegal conversion on the owner.

An examination of our Cities and Villages Act reveals that the City does not have expressly delegated powers to proceed against the money lender in this type of violation. Such a power would have to exist, by necessary implication from the City's power, to regulate construction and alteration of buildings. However, to be a reasonable and valid exercise of such powers, we are of the opinion, that the party against whom the enforcement is sought must have some means of control over the property.

For this reason, we doubt that an ordinance placing such a duty on the money lender or mortgagees generally could be sustained against an attack as to its validity and constitutionality. This position is substantiated in the case of *Thiener v. Speckin*, 290 Ill. p. 181, which held:

"While the mortgage conveys the title as between the mortgagor and mortgagee, such title is only a qualified one as security for the creditor during the existence of the debt and when the debt is paid by them, the title and right of possession of the mortgagee are at an end."

In the case of *American Trust and Safe Deposit Co. v. Eldred*, 267 Ill. App. 176, it was held that:

"The contractor has the right of possession until default in the terms of the mortgage but he cannot interfere with the right of the mortgagee to enter for condition broken.

"After condition broken, the mortgagee has the right to possession against the mortgagor or any one claiming under him by any right and mortgagee has the right to hold possession, when taken, until the debt is satisfied, his possession being a legal possession."

In the case of *Miller v. Frederick's Brewing Co.*, 405 Ill., p. 591, it was held that:

"A mortgage or trust deed in the nature of a mortgage, as between mortgagor and mortgagee, at law this legal title in the mortgagee only for the protection of his interest, and he may, upon default enter and hold possession of the premises and take the rents and profits in payment of his mortgaged debt, which purpose he may maintain ejectment to secure possession until his debt is satisfied. He may not be ejected by the mortgagor or by any one claiming under him by a junior mortgage."

In the case of *West Side Trust and Savings Bank v. Lopoten*, 358 Ill. p. 632, it was held that:

"A mortgagor is the legal owner of the mortgaged premises as against all persons except the mortgagee and his assigns and although a mortgagee conveys title as between a mortgagor and mortgagee, it is only a qualified title as security for the debt, the mortgagor being regarded as the owner for all beneficial purposes, subject only to the rights of the mortgagee.

"The mortgagor enjoys the right to sell or make leases on the premises and his grantee or lessee will have the right of possession until default in the terms of the mortgage, but the mortgagor cannot make a lease which will give greater rights than he himself possesses or which will interfere with the right of the mortgagee to enter for condition broken."

Our most feasible alternative is to propose to the lending institutions as well as the Federal Housing Administration who guarantees many of these loans under Title one of the Federal Housing Act, to require a building permit from the City of Chicago prior to releasing the mortgage funds. In this manner, many of these illegal conversions or alterations would be stopped for failure on the part of the owners or contractors to furnish a building permit.

We discussed this matter with Mr. James Moreland, Regional Director of the Federal Housing Administration, and he suggested that our proposal to require a building permit prior to disbursement of the mortgage money be taken up with Norman F. Mason, Commissioner of the Federal Housing Administration in Washington, D. C. We believe this could be best accomplished if a representative from your office would make a trip to Washington and confer with Mr. Mason. You could easily point out to Mr. Mason that by requiring a building permit, the banks whose loans are guaranteed by the F. H. A. would not only protect the borrower, but would also protect the Government by reducing the percentage of their losses, resulting from use of their money for illegal conversions.

BUILDING AND FIRE PROVISIONS RETROACTIVE

(No. 12074—Chief, Fire Prevention—J. P. M.—September 5, 1956.)

We acknowledge your recent letter in which you request an opinion as to whether buildings over eighty feet in height, which were built at least fifty years ago, are subject to the provisions of Chapters 92 and 64-2 of the Municipal Code of Chicago, which requires standard inside standpipe assistance, as defined in the above mentioned chapters of the Code.

Please be advised that Chapter 64-2 provides as follows:

"Standard inside standpipe systems complying with the requirements of chapter 92 shall be provided in all buildings exceeding eighty feet in height with the following exceptions:

(a) *Institutional Units.* In Institutional units standpipes shall be provided in all buildings more than four stories or fifty-five feet in height.

(b) *Stage Blocks.* In stage blocks standpipes shall be provided on each side of the stage, on each tier of dressing rooms, and within fifty feet of all property rooms, store rooms or work rooms.

(c) *Storage Structures.* Standpipes shall not be required in grain elevators or similar storage structures where such standpipes are ineffective owing to the type of structure and inaccessibility of hose connections.

For the purpose of determining standpipe requirements, the height of a building shall be determined in accordance with the provisions of section 51-1.1. Towers, steeples, tanks and similar structures not intended or used for human occupancy shall not be considered in determining the height."

Chapter 90-1 of the Municipal Code provides that Chapters 90, 91 and 92 shall be part of the fire regulations of this code. Chapter 90-2 of the Municipal Code provides as follows:

"All buildings and structures now existing or hereafter erected, altered or enlarged, shall be classified for the purposes of the fire regulations of this code according to occupancy, use and type of construction in accordance with the building provisions of this code.

Chapter 90-3 provides that:

"It shall be unlawful to continue the use of or occupy any building, structure or place which does not comply with those provisions of this code which are intended to prevent a disastrous fire or loss of life in case of fire, until the changes, alterations, repairs or requirements found necessary to place the building in a safe condition, shall have been made."

Chapter 92 provides for standard inside standpipe systems.

The language of the ordinances cited above shows the intention of the City Council that the ordinances cited should apply to existing buildings as well as buildings to be built in the future.

The court, in the case of *Clarke v. The City of Chicago*, 159 Ill. App. 20, sustained the authority of the City Council to pass an ordinance retroactive in character. In that case the court stated:

"If the City Council from observation or experience determined that certain provisions relating to the construction and operation of a theatre were necessary for the protection of persons attending such theatre, it would be as important for their safety to apply such provisions to theatres already built as to those to be built thereafter."

The court, in the case of *Clarke v. The City of Chicago*, also cited the case of *Seattle v. Hinckley*, 20 Wash. 468, 82 Pac. Rep. 747. In that case the Washington court stated:

"There is no merit in the contention that the respondent had an inherent or valid right because he complied with the law existing at the time he built. There is no such thing as an inherent or valid right to imperil the right or impair the safety of the community. But, to be protected against such impairments or imperilments is the universally recognized right of the community in all civilized governments—a protection which the government not only has a right to vouchsafe to its citizens, but which it is its duty to extend in the exercise of its police powers * * * It would be a sad commentary on the

law if communities were powerless to compel the adoption of the best methods for protecting life in such cases simply because the confessedly false method in use was the method provided by law at the time of its construction."

The Supreme Court of Illinois, in the case of *Williams v. The City of Chicago*, 266 Ill. 267, wherein the ordinance of the City of Chicago required the installation of certain fire apparatus in new and existing apartment buildings, the court stated as follows:

"We also are of the opinion that the fact that plaintiff in error's buildings had been constructed under permits from the city and in accordance with the then existing ordinances is no valid objection to this ordinance. All rights are subject to the police power of the state, and a citizen cannot acquire a vested right of exemption from a proper and reasonable exercise of that power for the public health, safety or welfare."

It is therefore the opinion of this office that the City Council has the authority to apply Chapters 92 and 64-2 to existing buildings, and require that standard inside standpipe systems be built and maintained in the buildings described by you, provided that such buildings are not within the exception of Chapter 64-2 above cited.

Ed. Note: See *City of Chicago v. L. J. Sheridan Co.*, 18 Ill. App. 2d 57.

CANOPIES ON SOUTH WATER STREET MARKET

(No. 12100—City Comptroller—A. F. G.—January 8, 1957.)

Your letter of October 17, 1956, is as follows:

"The Department of Buildings has suggested that we cancel warrants for collection on canopies located at various points on the South Water Street Market because the canopies are entirely on private property even though they extend over the sidewalk because the sidewalks themselves are on private property.

"Since the public uses these walks and because they become public ways, it may be that the canopies are subject to our annual inspection fee.

"Will you please advise me whether or not we have authority to charge and collect the annual inspection fees for canopies extending over the sidewalks at the various locations on South Water Street even though the canopies are on private property."

If the canopies in question are subject to the annual inspection, they would also be subject to the provisions of Section 34-14 through 34-20, which provide the conditions under which canopies and marquees over public ways may be erected, and providing compensation to the city for the privilege of their erection.

Mr. Hunter of the Compensation Bureau advises us that the canopies in question are erected on private property, do not extend into or over public ways, and are not subject to the payment of compensation. It follows, therefore, they are not subject to annual inspection fees, and you should cancel the warrants as requested by the Department of Buildings.

PERMITS FOR FOUNDATION ALONE

(No. 12103—*Commissioner of Buildings—E. W. P.—January 23, 1957.*)

We have your letter of January 16, 1957 in which you request our opinion relating to the issuance of permits for foundations alone in the case of construction of large buildings. You advise that your policy, dictated by practical expediency, because of the natural lapse of time between the formation of structural plans for foundations, and subsequent detailed plans for the super-structure, has been to issue permits for foundations alone on receipt of the plans and later on receipt of the plans for the super-structure to issue the complete permit and apply the fee paid initially for the foundation permit to the total permit costs.

Section 43-4 of the Municipal Code provides that all drawings and plans for the construction, erection of any building or other structure for which a permit is required shall first be processed through the Commissioner of Buildings for examination and approval as to proper use of the building and premises and as to compliance in all other respects with the zoning ordinance. Thereafter, the Building Department presents them to the Board of Health, Department of Smoke Inspection, Fire Department, Department of Boiler Inspection and Department of Public Works for their examination and approval. After the drawings and plans have been examined and passed upon by these other city departments they are then returned to the Commissioner of Buildings for final examination and approval.

There is no authority in the Code for a foundation permit. The full drawings and plans for the construction and erection should be presented and approved in accordance with the provisions of the Code before a permit issues.

It appears to us that good practice on the part of architects and builders should require complete plans and specifications for the entire project at the time of application for a permit. It is also true that plans and drawings are changed even after the issuance of a permit for a super-structure and if these changes are so designed as to meet the requirements of the Code, they are approved by the various city departments and the permit is still valid.

Relating to excavation and foundation for churches and other non-profit organizations, the full plans and specifications should be first submitted before the granting of any permit unless the provisions of the Code are changed to permit an initial foundation permit. The fee, while it is important, is by no means a controlling factor and there should be no deviation in method for any types of structures for the Code makes no distinction.

ARCHITECTURAL PLANS

(No. 12112—*Commissioner of Buildings—A. F. G.—March 19, 1957.*)

In your letter of February 13, 1957 you request an opinion as to the application of the provisions of the Illinois Architectural Act, Chapter 10½ of the Illinois Revised Statutes as they relate to the enforcement of Chapter 45 of the Municipal Code of Chicago, entitled "Building Plans".

Section 2 of the said Act, defines what constitutes practice of architecture as: "The planning and supervision of the erection, enlargement or

alteration of any building or buildings or of any parts thereof to be constructed for others". It also defines a building.

Section 4 of the same Act, entitled "Construction and application of act" describes certain things that are without the scope of the Act, among which are the following:

"Nor shall anything contained in this Act, prevent persons, mechanics or builders from making plans and specifications for or supervising the erection, enlargement or alteration of buildings or any parts thereof to be constructed by themselves or their own employes for their own use, provided that the working drawings for such construction are signed by the authors thereof with a true statement thereon of their relation to such construction and that the makers thereof are not architects."

Another exception in this section reads as follows:

"Nor shall said Act apply to any building, remodeling or repairing of any building or structure within the corporate limits of any city or village, where the total cost of said building, remodeling or repairing does not exceed the sum of seventy-five hundred dollars."

After citing the foregoing excerpts from the Architects' Act in your letter, you state:

"We have differentiated between relatively minor kinds of construction as contrasted with more involved or complex types of construction in our procedure for processing applications for permits.

For instance, for contemplated construction activities involving private garages, dormers, fences and similar work of a miscellaneous nature, permits have been issued upon the submission of a sketch with the application signed by the owner, together with other documentary proof which we deem necessary, such as a copy of the contract, without requiring detailed plans, signed and sealed by an architect, structural or professional engineer, as required by section 45-2 of the Municipal Code.

The above procedure was established and perpetuated throughout the years so as not to place an undue hardship and expense upon the public for small jobs, and still give the department sufficient control over the project to insure a safe and legal installation.

The first question is: Are we in conflict with this Act in following the established procedure explained above in the processing of applications for the types of construction activities noted?

Secondly, can we insist upon complete detailed plans as required by section 45-2 of the Municipal code, signed and sealed by an architect or engineer, wherever deemed necessary to protect adequately the public health or safety when the estimated cost of construction is less than seventy-five hundred dollars?"

In answer to your first question, we do not believe the procedure outlined in your letter conflicts with the State Act. Answering your second question, we do not believe you can require plans for buildings, the estimated cost of which is less than 7500 dollars, to be signed and sealed by a licensed architect, as the State law does not require buildings of that type to be so signed and sealed.

PERMIT AFTER CONSTRUCTION

(No. 12115—*Commissioner of Buildings—E. W. P.—April 3, 1957.*)

We have your letter dated March 20, 1957, in connection with Section 39-4 of the Municipal Code of the City of Chicago, which provides:

"Any person who causes any construction, repairs, or alterations to be made in or for any building, structure, or any part thereof, without first obtaining the permit or permits required therefor by any of the provisions of this code, shall be fined not less than ten dollars and not more than two hundred dollars for each day that such construction, repair or alteration or such maintenance or operation shall have existed * * *."

You request an opinion as to whether or not a permit should be issued after it had been established that construction, repairs or alteration had been made without first obtaining a permit and the Department of Buildings had requested the Corporation Counsel to prosecute for violation.

It is our opinion that a permit should be issued, assuming that a permit could be issued, and that a written notice be given to the applicant at the same time, advising him that the issuance of the permit does not relieve him from liability of his violation to that date.

The Ordinance provides that he is liable for every day he fails to obtain the permit, therefore, if he is entitled to a permit on the basis of his application and plans, etc., the City cannot increase his liability for further fines by refusing a permit if he is entitled to receive it.

BUILDING DEMOLITION

(No. 12174—*Fire Commissioner—J. C. M.—October 29, 1957.*)

In answer to your inquiry of October 28, 1957 relative to in what authority rests the determination of whether a building is dangerous to life or health necessitating demolition, be advised that under Section 39-12 of the Municipal Code of Chicago, decision may be made by the Commissioner of Buildings or the Fire Commissioner. We also call your attention to the provisions of Sections 12-27 and 41-9 of the Municipal Code of Chicago. The last section refers to the demolition of a building which constitutes an actual and imminent danger to the public by order of the Commissioner of Buildings forthwith.

It has been the policy of the Corporation Counsel to insist that a Council Order be obtained declaring a building to be in a dangerous condition and requesting this office to proceed to have same demolished. Thereafter, we file suit in court to obtain a proper decree. By following this procedure, no public official is subject to personal liability. However, under the last section referred to, the Commissioner of Buildings does have authority to order a building demolished that presents imminent danger to the public. It is only in very rare instances that this authority is exercised.

Under the Code the Commissioner of Buildings is protected against any judgments that may be rendered against him.

"PIECE MEAL" PERMITS

(No. 12177—Commissioner of Buildings—L. A. W.—November 15, 1957.)

We acknowledge receipt of your recent request for an opinion as to whether or not you are legally empowered to establish a policy to refuse to issue "piece meal" permits.

From observations found in 43 Corpus Juris, Page 352, Paragraph 391, the general rule appears to be that ordinarily officials in the Department of Buildings of municipal corporations may make rules and regulations to secure the effective enforcement of the provisions of the Building Code for the administration of the Bureau of Buildings, and do all necessary and proper acts for those purposes, citing *Brennan v. George L. Walker*, 173 N. Y. S. 440.

In McQuillin Municipal Corporations, 3rd Edition, Section 26.221, the text reads as follows:

"It is universally true that the courts are zealous not to interfere with legislative or administrative discretions in denial of building permits except for abuse of that discretion."

In *People v. Lueders*, 287 Ill. 107, 117, our Supreme Court has said that the exercise of police power is subject to judicial review, and the property rights cannot be destroyed by arbitrary enactment. Our Supreme Court has also said in *Rohrbach v. Cavallini*, 210 Ill. App. 182, that the grant or refusal of building permits cannot be left to arbitrary discretion; and that the applicants for permits must comply with the conditions prescribed. *Mills v. White*, 304 Ill. 256.

The Municipal Code of Chicago, Section 82-6, pertaining to the approval of permits for a plumbing system in a building provides as follows:

"The approval and permit of the Department of Buildings may be withheld until all permits have been issued by the Department of Water and Sewers or other authorized department; provided, however, that such shall be issued before the building permit issued by the Commissioner of Buildings."

From an examination of the foregoing authorities and pertinent sections of the Municipal Code of Chicago we are of the opinion that if, in your discretion, you believe that the ordinances will thereby be observed, you have a right to refuse to issue a "piece meal" permit until all other permits necessary are obtained to correct all violations on a given building *with one exception*, and that is, when a duly registered electrical contractor who has complied with all applicable rules and regulations for a permit to do electrical work applies for a permit for said work.

In view of Chapter 24, Article 37, Section 37-3, Paragraph 3, of the Cities and Villages Act and the Sections 86-2, 86-28 and 86-31 of the Municipal Code of Chicago, the chief electrical inspector of the Bureau of Inspection is empowered to approve or deny permits coming within the electrical regulations of this Code.

Where an aggrieved applicant who is denied a "piece meal" permit desires to appeal your decision based upon the exercise of your discretion, he may appeal to the Court for judicial review.

REFUSE ENTRY TO INSPECTOR

(No. 12200—Fire Commissioner—L. A. W.—February 5, 1958.)

Chief Robert J. O'Brien of your office recently enquired as to the feasibility of obtaining a warrant against owners of slum properties who refuse entry of inspectors for the purpose of inspecting premises for possible fire violations.

Accordingly, we made a study of this problem and found that under Section 477 of Chapter 37 of the Illinois Revised Statutes, paragraph 4, provision is made as follows:

"Any police officer of the city may arrest on view any person who may be seen by such police officer in the act of violating, within the city, any ordinance of said city or any ordinance of any municipal corporation situated, in whole or in part, within the limits of said city, whenever such violation is, by such ordinance, made punishable by fine or otherwise. Any person so arrested shall, without unnecessary delay, be taken by such officer to some convenient branch of the Municipal Court and such police officer shall thereupon make and file a complaint in writing under oath against such defendant of the violation by such defendant of such ordinance and such defendant shall thereupon be dealt with according to law in the same manner as if he had been arrested in the first instance under a warrant lawfully issued."

Section 39-9 of the Municipal Code provides:

"The appropriate officials charged with the administration of any of the provisions of this code enumerated in Section 39-1 of this chapter, or any of them and their respective assistants, shall have the right to enter any building, or premises, and any and all parts thereof, at any reasonable time, and at any time when occupied by the public in order to examine such buildings or premises to judge of the condition of the same and to discharge their respective duties, and it shall be unlawful for any person to interfere with them in the performance of their duties."

Section 39-3 of the Municipal Code provides:

"Any violation of, or resistance to, or interference with the enforcement of, any of the provisions of this code enumerated in Section 39-1 of this chapter, to which no other penalty provision is applicable shall be punished by a fine of not less than five dollars and not more than two hundred dollars, and each day such violation shall continue shall constitute a separate offense for which a fine as herein provided shall be imposed."

In view of the above provisions we believe that no warrant may be issued for the owner's refusal to permit entry to a premises for inspection purposes. We have, however, the following remedies. We can recover a penalty for such a refusal as provided in Section 39-3; we can file suit in the Circuit or Superior Court for a mandatory injunction directing the owner to permit us to enter for the purpose of inspection. In case of an emergency a third way to proceed against the person refusing admission to your inspectors in a given building is to call a police officer to witness the refusal, and then he can make an arrest of such person without a warrant.

There are a number of Illinois cases which hold that a police officer has the power to make an arrest of any person who he observes in the act of violating a City ordinance. This arrest may be made at that time even

though the ordinance does not involve a breach of peace. The cases which sustained that position are: *Hermanson v. Scheffer*, 184 Ill. App. 273; *Wice v. Chicago and North Western Ry.*, 93 Ill. App. 266.

In view of the above we believe that if any of your inspectors are refused entry to a building where they have a right to make an inspection under the City code and if a policeman is present at the time when they are refused entry for such an inspection the police officer has the right to arrest the person who refuses to permit the inspection. This arrest may be made without first procuring a warrant.

ELECTRICAL CODE—RETROACTIVE

(No. 12219—Chief Electrical Inspector—A. G. G.—April 29, 1958.)

We acknowledge your recent letter in which you request an opinion as to whether buildings built prior to the present Electrical Code can be made to comply with the present Electrical Code when violations are found.

Chapters 88-560.2 and 88-560.3 provide specifically that each single family residence and apartment shall meet certain requirements. Chapter 88-560.1 provides that chapter 88-560 "shall govern the installation requirements to safely supply the electrical needs in single family and apartment occupancies. * * *."

The fact that the City Council in using the language "each single family dwelling and apartment shall be provided" may be construed to mean all single family and apartment occupancies. The cardinal principle of statutory construction is that to ascertain and give effect to the legislative intent, it is proper to consider the occasion and necessity for the law, the meaning of the words, enlarged or restricted and also to existing circumstances, contemporaneous conditions and the object sought to be attained by the statute." *Petterson v. City of Naperville*, 9 Ill. 2d 233.

In modern living practically all of the appliances not known 30 or 40 years ago operate on electricity and place burdens on antiquated electrical systems installed 30 or 40 years ago.

The latest in a long line of decisions of the Illinois Courts in upholding the fact that an ordinance may apply retroactively is *Abbate Bros. v. City of Chicago*, 11 Ill. 2d 337. In that case the court cites with approval the following language of the case of *City of Seattle v. Hinkley*, 82 P. 747: "It would be a sad commentary on the law, if Municipalities were powerless to compel the adoption of the best methods for protecting life in such cases because of the confessedly faulty method in use was the methods at the time of construction." The court in *Williams v. City of Chicago*, 266 Ill. 267 stated: "We also are of the opinion that the fact that plaintiffs in error's buildings had been constructed under permits from the city, and in accordance with the then existing ordinance is no valid objection to this ordinance. All rights are subject to the police powers of the state, and a citizen cannot acquire a vested right of exemption from a proper and reasonable exercise of that power for the public health, safety or welfare."

It is, therefore, the opinion of this office that where misuse, hazardous use or abuse of electrical installations in violation of the Code exists, the buildings in which the violations exist can be required to meet the minimum standards of safety outlined in the Code.

BUILDING PERMIT TIME EXTENSION

(No. 12246—Commissioner of Buildings—S. F.—August 12, 1958.)

In answer to your request for an opinion as to the legal status of the building permit issued for 9155 South Laflin, please be advised that under the existing circumstances, as you have described them, the law is clear that the permit is valid and that work may proceed under it.

Under Chapter 43 of the Municipal Code of Chicago, Section 43-9 provides in effect that if work has begun within six months under a properly issued permit an extension shall be granted for a maximum of two additional six month periods.

Your communication indicates that a permit was issued regarding the subject property on June 24, 1957, and that work on the site occurred on August 1, 1957 and December 4, 1957.

Your communication further indicates that on April 24, 1958, the permit was renewed by the permittee to another party. Thereafter work continued under this permit.

The applicable law is clear and is contained in the standard reference work McQuillin's Municipal Corporations, Volume 9, Chapter 26, Section 9. In this section it is stated that the general rule is as follows:

"The general rule is that where an owner acts on a permit duly issued and expends money and incurs liabilities in connection therewith, or otherwise lawfully and materially changes his position, the permit cannot be revoked except for fraud, misrepresentation or concealment. * * * In short, permits lawfully granted and substantially acted upon by the landowner cannot ordinarily be revoked to his prejudice. Leastwise, revocation of a building permit is unauthorized where construction thereunder has been commenced in good faith."

"Furthermore, it is established that a permit and investment, expenditures, construction or work under it may give rise to property rights entitled to protection of the law as such." This last doctrine is contained in Section 26.215.

While Chapter 43, Section 9 provides that the extension of a permit shall be applied for within ten days after the expiration of the original permit, the act of the building department in granting the extension and agreeing to the assignment and allowing the work to proceed constituted a waiver of the ten day limit. The waiver, furthermore, is within the discretion of the department and so was a legal act.

Since there was no question of fraud or misrepresentation on the part of the permittee he has gained a vested right by the work which he commenced under the permit and had a lawful right to transfer this permit. The building department by its act of extending the permit and agreeing to the transfer recognized the property right which the permittee had gained. Thus, the present permit is valid and work may proceed under it.

UNSIGHTLY AND UNOCCUPIED BUILDINGS

(No. 12286—Alderman, 40th Ward—R. N.—May 26, 1959.)

You have asked this department if an ordinance designed to prevent property owners "from deteriorating a neighborhood by boarding up windows and fronts" of unoccupied buildings from which the plate glass has been removed, except to meet emergency conditions. You state that when thus boarded up the buildings present an unsightly appearance and give the street a shoddy, run-down effect.

Opinions of this department on similar situations appear in the printed volumes of Opinions of the Corporation Counsel in volumes XVIII, XIX and XXI. In volume XVIII at page 384 (opinion printed in full) we held :

"The city has no authority to summarily demolish dilapidated or unsightly buildings without the consent of the owner unless they are imminently dangerous to the public health or safety and even then only in case the existing situation cannot be obviated by less drastic means than the complete destruction of the buildings.

Mere unsightliness of a building which is the usual and natural result of dilapidation does not make it a nuisance and the city would have no authority to declare it a nuisance for that reason alone.

The city has power to abate nuisances only to the extent such abatement is necessary.

If the City Council by ordinance directs the destruction of a building which is not in fact dangerous to the public health or safety, the city would be liable for damages sustained."

In volume XIX at page 64 (opinion printed in full) we held :

"A building which is structurally safe, and which may be boarded up so that there will be no possible chance of anyone remaining in it, may not be declared by the City to be a nuisance.

The City has no authority summarily to demolish dilapidated or unsightly buildings without the consent of the owner unless they are imminently dangerous to the public health or safety, and then only in case the existing situation cannot be remedied by less drastic means than the complete destruction of the building."

In volume XXI at page 166 (opinion printed in full) we held :

"Buildings which are in such dilapidated condition as to endanger the health or lives of the citizens of the city are nuisances, and ample power is vested in the city council to abate such nuisances.

Buildings, however, which are merely unsightly do not constitute a nuisance and the city council has no authority to order their demolition. An uncompleted building which is structurally sound and sanitary may not be declared a nuisance simply because it is an eyesore. Where a nuisance is not a building itself, but the use to which it is put, the city cannot declare the building a nuisance and order its removal, but rather the cause of the offense may be ordered to be removed."

And also in volume XXI at page 168 we held :

"An ordinance requiring the owner of walls adjacent to a wrecked building to fill in, smooth and paint such walls when they are otherwise

structurally sound, would be invalid as an improper exercise of the police power."

All of the above opinions are replete with citations.

In view of the above, there being no reason to change the opinion of this department as to the lack of power to enact an ordinance such as you request, we have not attempted to draft one.

WITHHOLD PERMIT PENDING LEGISLATION

(No. 12305—*Commissioner of Buildings—R. L. C.—November 24, 1959.*)

This is to acknowledge your request for an opinion as to what course of action you would pursue under the following circumstances.

You relate that the Chairman of the Building and Zoning Committee of the City Council has advised you that there is presently pending before his committee an amendment to the Chicago Zoning Ordinance regarding laundrettes and the areas in which they are a permitted use. You further state that the Chairman has requested you withhold approval of laundrette permit applications pending final disposition of the matter by the Committee; and our guidance in this matter is solicited.

In a recent case (*Chicago Title and Trust Co. v. Palatine*, 22 Ill. App. 2d 264) the Illinois Appellate Court at page 268 said:

"* * * while the municipal authority has no right to arbitrarily or unreasonably refuse or delay the issuance of the permit, the issuance may be delayed when there is under consideration or pending an ordinance under which the issuance of the permit would be prohibited. It is our opinion that this is supported by reason as well as by authority."

In the light of this language it is our opinion that you may withhold the issuance of permits for laundrettes so long as the amendment is actively under consideration by the Committee.

However, we hasten to caution you as to the application of this language in this area because in the same decision the court affirmed the established rule of law in Illinois as being.

"* * * where there has been a substantial change of position, expenditures or incurrence of obligations made in good faith by an innocent party under a building permit or in reliance upon the probability of its issuance such party has a vested property right and he may complete the utilization of the premises for the purpose originally authorized irrespective of subsequent zoning or a change in zoning classification." (Page 267.)

From a reading of the above two quotes it is apparent that the success or failure of each case where a permit is refused pending legislative action will be determined by the particular facts involved.

VESTED RIGHT TO A PERMIT

(No. 12349—*Zoning Administrator—E. W. P.—July 20, 1960.*)

Responding to your request for an opinion as to whether or not you should issue a permit for the construction of a funeral chapel at the S. W. Corner of Granville and California Avenues, we have examined the zoning maps, followed the course of procedure of a proposed zoning change, and

also the Appellate and Supreme Court decisions which govern and have arrived at the following conclusions:

The property is zoned B4-2, Restricted Service District, and permits the erection and use of a funeral chapel on the proposed location. April 14, 1960, there was filed with the City Council an application for an amendment to change the B4-2 classification to a B2-2 Restricted Retail District. This amendment was referred to the Committee on Building and Zoning and in accordance with the provisions of the ordinance was also referred to the City Planning Commission for study, analysis and recommendation to the City Council.

The Planning Commission prepared and presented their official written report, in which they stated that the proposed change would constitute spot zoning and recommended that it be denied. After public hearing and receipt of this written report the Committee has deferred taking action and the application is still pending.

The subject site was purchased by Piser Memorial Chapel at a cost of \$29,500.00. The completed final plans and specifications for the erection of the chapel cost \$18,000.00, bids have been taken and a contract awarded for the erection of the building in the amount of \$300,000.00.

In the case of the *Chicago Title and Trust Co. v. Palatine*, 22 Ill. App. 2nd 264, the Court held that in certain instances where there was a proposed comprehensive zoning ordinance or an amendment thereto pending that the municipality could withhold the issuance of a permit for a use that was allowed under the existing ordinance, but which would be prohibited by the proposed ordinance. In that case, however, there were no established vested rights. The proposed ordinance was adopted about three weeks after the application for the building permit and there was no question raised as to the reasonableness of the proposed ordinance. In that case the Court quoted the prevailing rule of law as to vested rights on page 267.

"The rule of law in this State is that where there has been a substantial change of position, expenditures, or incurrence of obligations made in good faith by an innocent party under a building permit or in reliance upon the probability of its issuance such party has a vested property right and he may complete the utilization of the premises for the purpose originally authorized irrespective of subsequent zoning or a change in zoning classification, citing—*1550 North State Corporation v. Chicago*, 15 Ill. 2d 408, and *Deer Park Civic Ass'n. v. City of Chicago*, 347 Ill. App. 346."

It is our opinion, based on the vested rights that the applicant has acquired and the recommendation of the City Planning Commission that the proposed amendment is unreasonable and should be denied, that the permit for the erection of the funeral home at the Southwest Corner of Granville and California Avenues should issue, provided all ordinances are complied with and irrespective of the application to rezone the subject property.

DECONVERSION UNDER RENEWAL PLAN

(No. 12363—Commissioner of Buildings—E. W. P.—December 29, 1960.)

You will recall the conference held in your office in the presence of yourself and your Office Personnel, Mr. Maurice Handelman and the writer pursuant to your letter dated October 31, 1960, relating to permit applications for building alterations or repairs in the Hyde Park-Kenwood Urban Renewal Plan and the South West Hyde Park Neighborhood Redevelopment Areas.

You advised in that letter that questions had been raised by Commissioner D. E. Mackelmann, the Commissioner of the Community Conservation Board of Chicago, and Executive Secretary of the Neighborhood Redevelopment Commission, in connection with approval of plans and the issuance of permits for alterations and repairs ordered by the Department of Buildings for the correction of violations in structures which were illegally converted in those areas. You stated that permits never were secured for the conversions, and that the dates of the conversions were unknown. The applications for permits and plans submitted indicated the intent of the owners to reduce the number of units, or deconvert from the number now in existence to a lesser number, which would be in excess of the original number of units provided at the time the buildings were constructed. In some instances, the plans indicated interior changes to provide for proper exits, and the providing of proper fire resistance construction for stairway enclosures, walls, floors, and ceilings.

You advised that it is Mr. Mackelmann's viewpoint that where a building has been illegally converted and an application for permit submitted, that the application should be considered as not one for deconversion, but rather as an application for an increase in the number of units, or conversion from the number of units originally legally constructed to a higher figure. You gave as an example that if a building was originally constructed under a permit for 12 apartments, and at a later date was illegally converted to 30 apartments, and the owner proposed to have 24 apartments, actually, the application should be considered as one for an increase from the original number of 12 apartments to 24 apartments. You stated that this, in reality, was an application for a change from the original legal use to a proposed use, which may be allowed under existing code provisions. You also stated that it was Commissioner Mackelmann's view that, under the terms of the Urban Renewal Plan applicable to such buildings, no change in intensity of use should be permitted unless all City codes applicable to new construction are complied with.

You quoted from the ordinance approving the Hyde Park-Kenwood Urban Renewal Plan, particularly Part H relative to the specific requirements for minimum regulations with respect to retention of buildings in the rehabilitation areas, as follows:

"With respect to the rehabilitation areas and any properties not acquired in clearance areas, the minimum housing, plumbing, electrical, fire and health codes and the provisions of this Urban Renewal Plan shall apply. *In addition, in all buildings to be retained in the rehabilitation areas, no alterations, INCREASING the intensity or changing the character of use, shall be permitted unless all the provisions for new construction in the Chicago Zoning Ordinance, as applied in this plan and shown on Map 6, are met. This includes uses permitted or excluded, maximum densities, maximum floor area ratio, setback, side yards, off-street parking and loading, and such other noted provisions, and all other controls and standards required of new construction for the district in question stands.*" (Italics as supplied.)

You develop other details in your letter which are kindred to your main topic but unnecessary to expand at this time to answer your material questions. You propound two of these and ask our opinion as to their validity. The first question asked is as follows:

"Are the provisions of the Urban Renewal Plan—Part H—'Regulations and Controls to be Enforced in the Urban Renewal Area to Sustain the Renewal;' Exhibit 1—'Zoning Control to be Enforced in Renewal Area;' and Map 6—'Proposed Zoning Districts' applicable, or must the City Council take legislative action on the amendment of the Chicago Zoning Ordinance to rezone the Hyde Park-Kenwood Area?"

Our answer to this must be, in view of Statutory requirements that the proposed zoning amendment must go before the Committee designated for

zoning, which is the Building and Zoning Committee, and that publication of notice must be made in a newspaper and that public hearings must be held at designated times. The City Council is required to take the necessary legislative action on the amendment of the Chicago Zoning Ordinance to rezone any part of the Hyde Park-Kenwood Urban Renewal Plan area before the indicated zoning becomes a reality.

The second question that you raise is as follows:

"Is the proposal to deconvert to be considered not as an actual deconversion, but rather as a conversion and an increase in the intensity or change in character of use, and that no change in intensity or character of use is permitted unless all City codes applicable to new construction are met?"

Section 73-2 of the Zoning Enabling Act grants the municipality the power, amongst others, to prevent additions to and alteration or remodeling of existing buildings or structures in such a way as to avoid the restrictions and limitations lawfully imposed, and also provides that in all ordinances passed under the authority of the Act, due allowance shall be made for existing conditions, the conservation of property values and the direction of building development to the best advantage of the entire municipality, and the uses to which the property is devoted at the time of the enactment of the ordinance, and also provides that the powers conferred by the Act shall not be exercised so as to deprive the owner of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted.

In the example given in your letter, where a building was originally constructed under permit for 12 apartments and was then unlawfully converted to 30 apartments and the proposal is now that the owner wishes to have 24 apartments, it is our opinion that we should take a realistic attitude and regard the decrease of 30 units to 24 units as a deconversion and not as an increase in the number of units over the original legally constructed figure. We are compelling the owner to reduce the density of his use to the allowable number of units lawfully provided.

It is our opinion that these alterations of existing buildings are not increasing the intensity or changing the character of the use, but rather they are decreasing the intensity and maintaining the character of use. The minimum housing, plumbing, electrical, fire and health codes must be complied with; the deconversion is made so as to make the building a permitted use, to comply with maximum densities, maximum floor area ratio, and other controls and standards.

However, it is also our opinion that the building when deconverted meets all the conditions of the Urban Renewal Plan, which according to the regulation does not require compliance with setbacks, side yards and off-street parking and loading. It is obvious that the deconversion requires less off-street parking and loading than the present structure with its present number of units, and that the original structure had identical setback and side yard that it has now and will have after the deconversion decreasing the intensity, and that these factors cannot be changed without destruction of part of the building originally exteriorly constructed in the manner in which it stands today.

B. ZONING

HOMES ON TWENTY-FIVE FOOT LOTS

(No. 11786—Mayor—A. F. G.—February 11, 1954.)

With your memo of February 10, 1954 you transmitted a letter from the Executive Secretary of Back of the Yards Neighborhood Council which is as follows:

"A question has been raised regarding the legality of building homes on 24 and 25 foot lots located on the inside of a city block.

I would appreciate a written opinion on the legality of this inquiry. At the same time I would appreciate an opinion on the building of homes on a 24 or 25 foot lot on the outside corner of a city block. In Back of the Yards, approximately, 90% of all vacant lots are 24 or 25 foot lots, most of them are on the inside of the block."

There is nothing in the Chicago Zoning ordinance which fixes a minimum width of lots, and nothing in the said ordinance or in the building code which prohibits the erection of homes on 24 or 25 foot lots, either inside or corner lots. However such buildings are required to conform to the provisions of the said zoning ordinance with respect to Use districts, ground area, height, and building line restrictions set out in the various Volume Districts. In a 1st Volume District no building can exceed a height of 25 feet or 45 feet in a 2nd Volume District in a Family Residence, Duplex Residence, Group House or Apartment House District (Section 16, Zoning Ordinance).

In a First Volume District in these same Use Districts the maximum ground area of all buildings, exclusive of garages, is 40 per cent of the area of a corner lot and 35 per cent of the area of any other lot. In 2nd Volume Districts the percentage is 45 per cent of a corner lot and 40 per cent of the area of any other lot (Section 17, Zoning ordinance).

Section 18 of the Zoning ordinance is in part as follows:

"Building lines. (a) No part of the ground area of any building in Family Residence, Duplex Residence or Group House districts shall be nearer to the front street line than a distance equal to 15 per cent of the average depth of all lots, pieces or parcels in any such use district fronting in the block in which the building is located.

(b) No part of the ground area of any building in an Apartment House district shall be nearer to the front street line than a distance equal to 10 per cent of the average depth of all lots, pieces or parcels in such use district fronting on the block in which the building is located.

(c) No part of the ground area of any building containing one or more apartments in Family Residence, Duplex Residence, Group House, Apartment House or Specialty Shop districts shall be nearer to the rear lot line than 20 feet.

(d) No part of the ground area of a building in a Family Residence or Duplex Residence district shall be nearer to the side lot lines than 3 feet or 10 per cent of the width of the lot, piece or parcel, whichever is greater, excepting where the side lot line adjoins a public way."

The building must also comply with the minimum room areas provided for in Section 52-4 of the building code.

It was the practice of subdividers for many years to plat their subdivisions into 25 foot lots. These lots were intended for building purposes and were accepted by the City as such. This conclusion was evidenced by the action of the City in installing water and sewer service connections for each of 25 foot lots and by the issuance of permits for the erection of buildings on these lots. The statute on "Plats" under which these properties were subdivided provides for no limitation of the width or depth of lots in a subdivision. To hold that the owner of one of these lots could not erect a building thereon would deprive him of property without due process of law in violation of both the State and Federal Constitutions.

ADDITION TO AMPHITHEATRE

(No. 11815—Commissioner, Department of Buildings—C. P. H.—May 14, 1954.)

We have your letter of May 11, 1954, transmitting a communication dated May 7, 1954, addressed to you by Honorable Joseph P. Burke, Alderman of the 14th Ward. It appears that an application has been filed with the Department of Buildings for the issuance of a permit for the construction of a one story addition to the existing building known as the Chicago Convention Building and International Amphitheatre, located at 4168-4244 S. Halsted Street. The addition is to be erected on a parcel of land located on the west side of South Halsted Street, beginning at the south boundary line of the existing Amphitheatre for a distance of 600 feet in a southerly direction and for a distance of 300 feet in a westerly direction. These premises are commonly known as 4300-4360 S. Halsted Street.

The application for a building permit and the plans submitted therewith show that the proposed structure is to be used as an exhibition and display building. In a letter addressed to me under date of May 13, 1954, Winston, Strawn, Black & Towner, attorneys for the owners of the parcel of land, state, with reference to the use of the proposed addition, as follows:

"The proposed addition will not increase the seating capacity of the Amphitheatre. Its location with respect to the auditorium in the Amphitheatre, the height, type and character of the proposed addition will preclude any such possibility. *On the other hand, it will enable Agriculture and Industry to properly and attractively house and display plows, reapers, combines, trucks, carts, rigs, machinery, milking equipment and other implements of the farm and industry.*" (Emphasis ours.)

Under the provisions of the Chicago Zoning Ordinance, the parcel of land is zoned for both business and industrial uses (Chicago Zoning Ordinance, Map 31). The first question presented for our determination is whether or not the proposed building may be erected on this site.

As previously stated, the proposed building is to be used for exhibition purposes. Webster's New International Dictionary, Second Edition, Unabridged, defines the word, "exhibition" as follows:

"2. Act or instance of exhibiting for inspection, or of holding forth to view; manifestation; display.

3. a. That which is exhibited, held forth, or displayed.

b. Any public show; a display, as of works of art, or of feats of skill, or of oratorical or dramatic ability."

Section 13 of the Chicago Zoning Ordinance provides as follows:

"Industrial districts. Permitted uses in Industrial districts are:

- (1) Any use, including any special use but excluding residences or apartments, churches (other than those maintained by permitted uses in an industrial district for persons employed by said permitted use), public, grade and high schools and motor freight terminals.
- (2) Auxiliary uses, subject to the following limitations:
A residence or apartment may be maintained upon any premises for the caretakers and watchmen of the premises, and their families.
- (3) No residence or apartment, church, school, public auditorium, open-air assembly unit, amusement place of any kind operated for commercial purposes shall be permitted in areas zoned as Industrial districts."

Under the above quoted provisions of section 13, any use is permitted in an industrial district except those uses which are expressly prohibited therein. A use for exhibition purposes is not one that is prohibited in an industrial district. We have taken into consideration that section 13 prohibits a public auditorium use in an industrial district. Webster's New International Dictionary, Second Edition, defines the word, "auditorium" as follows:

"1. That part of a church, theater, or other public building, assigned to the audience. In ancient churches, the auditorium was the nave where hearers stood to be instructed; in monasteries, it was an apartment for the reception of strangers.

2. A room or hall for lectures, concerts, etc.; also, a building esp. designed or used for such purposes."

Manifestly, the proposed building, which is to be used for the display and exhibition of plows, reapers, combines, trucks, carts, rigs, machinery and implements, is not an auditorium under the above quoted definition. It is, therefore, our view that the proposed addition to be used for exhibition and display purposes is a permitted use in an industrial district, under section 13, and is permitted on that portion of the parcel of land zoned for industrial purposes.

The next question presented for our determination, is whether or not you may issue a permit for the erection of that part of the building which is to be located on that part of the parcel of land zoned for industrial purposes.

The application for the building permit and plans submitted therewith and the letter from Winston, Strawn, Black & Towner show that the building is to be used for exhibition purposes. Such use as heretofore stated may be permitted in a district zoned for industrial purposes. It is, therefore, our opinion that, in conformity with section 13 of the Chicago Zoning Ordinance, you may properly issue a permit for the construction of that part of the proposed building to be used for exhibition and display purposes on that part of the parcel of land which is now zoned for industrial purposes, provided that part of the proposed building complies in all other respects with the ordinances of the City of Chicago.

However, no building permit may be issued for that portion of the building which is to be erected on that part of the parcel of land which is now zoned for business use, since under section 10 of the Chicago Zoning Ordinance, a building used for exhibition purposes is not permitted in a district zoned for business purposes. There is now pending before the Committee on Building and Zoning of the City Council, an amendatory ordinance to rezone that part of the parcel of land which is now zoned for business pur-

poses to commercial purposes (Journal of the Proceedings of the City Council, dated April 14, 1954, page 7278). When this amendatory ordinance is adopted by the City Council, under Section 11 of the Chicago Zoning Ordinance, a permit may be issued for the erection of the remaining portion of the proposed building for exhibition purposes as such use is also a permitted use in a commercial district.

We transmit herewith a signed copy of the letter from Winston, Strawn, Black & Towner referred to herein.

READY-MIX CONCRETE BIN

(No. 11829—Commissioner of Buildings—A. F. G.—June 16, 1954.)

In your letter of June 14, 1954 you state:

"An application is being submitted on behalf of said company for a building permit to install and construct a steel structure supporting a bin and cement mixer, to be employed for mixing concrete materials at Yard 6, located at 5875 Rogers Avenue.

The machinery and equipment so to be installed is described by the applicant as consisting of steel beams with no walls and no roof, of a height not exceeding 85 feet. In this, what is claimed by the applicant to be a structure, is placed a bin, a mixer and other machinery and equipment employed in mixing building materials for the production of ready-mix concrete.

The area in question is zoned as a second volume district.

A special joint report in the matter has been prepared by John C. Kucharik, Chief Plan Examiner and Harry Kane, Chief Zoning Examiner, and is submitted herewith.

An opinion is requested as to whether a structure for which one section of the ordinance requires a permit can be excluded from all or parts of the provisions of the Zoning Ordinance."

From the description of the structure in your letter, and from a photograph of the structure which has been furnished us, we are of the opinion that the structure is not a building within the definition of that term in the Zoning Ordinance as it has no walls or roof. Further, it is our opinion that the structure is not subject to the height limitations provided in section 16 of the Chicago Zoning Ordinance for the reason that it is not in the class of structures which are subject to the height limitations contained in that section. It is not a chimney, or similar structure, nor is it a water tower, although it has some of the features of a water tower in that it has a bin for the storage and mixing of the cement, sand and other ingredients which go into the making of concrete just as a water tower has a tank for the storage of water. In our opinion the structure in question can be best described as a piece of equipment or machinery which was not intended to be included in section 16. That section is as follows:

"SECTION 16. Height of buildings. The maximum height of any building is 25 feet in 1st Volume districts and 45 feet in 2nd Volume districts.

In 1st Volume districts chimneys and similar structures above the roof shall not exceed 66 feet in height, and in 2nd Volume districts shall not exceed 85 feet in height, from the established grade of the lot, but water towers for sprinkler systems may be erected to a height of 60 feet above the height of the roof of the building."

This section limits the height of any building in 2nd Volume districts to 45 feet but permits chimneys and similar structures in 2nd Volume districts to be erected not to exceed 85 feet in height from the established grade of the lot. The lot here in question is in a manufacturing district, and in a 2nd Volume district, the structure does not exceed 85 feet in height from the established grade of the lot, and in our opinion its erection would not be in violation of section 16 above quoted.

The corporate authorities of municipalities have been given power by the Zoning statute (Section 73-1 of the "Revised Cities and Villages Act") "To regulate the height and bulk of buildings hereafter to be erected."

The power to regulate the height of a structure is an exercise of the police power. In discussing the extent of this power our Supreme Court in *Federal Electric Co. v. Zoning Board*, 398 Ill. 142 (1947), in holding invalid the action of the Zoning Board prohibiting neon signs on a radio tower under a section of a village zoning ordinance which limited to 30 feet in height, "structures other than buildings except municipal water towers", the court said: "All private property is held subject to a reasonable exercise of that power. It is the law that the State may, in the exercise of the police power authorize a city or village to impose regulations which limit the height of buildings or structures to be erected where such regulation is reasonably necessary for the protection of the public health, the public safety or the public welfare * * * limitations as to the height of structures in a municipal ordinance must bear some relation to the public health, safety or welfare. It does not appear that the regulation contained in section 12 which limits the height of structures to 30 feet is in any way related to the public health, safety or morals."

The City Council of the City of Chicago has exercised the police power granted to municipalities to impose regulations which affect the safety of buildings and other structures by the building code. The power to regulate the height and bulk of buildings was exercised by the city council under its zoning powers. If your description of the structure for which application for a permit has been made is correct, it is not a building or any part of a building within the meaning of Section 16 of the Chicago Zoning Ordinance. If the structure complies with the safety provisions of the building code to warrant a permit, the height limitation in Section 16 of the Zoning Ordinance does not bear any relation to the public health or welfare to warrant its application to this structure, and your department should issue a permit for its erection.

WATER TOWER HEIGHT

(No. 11879—Commissioner of Buildings—E. W. P.—January 27, 1955.)

We have your letter dated January 26, 1955, advising of the application to the Department of Buildings by Aldens, Inc., for the construction of a building at 4902 West Roosevelt Road, Chicago, which is designed to have a water tower, approximately 124 feet in height from grade to top of tower, as part of the installation.

You state in your letter that since this is in an Industrial Zone, Volume District 4, the height of the proposed water tower would, according to the position taken by the Chief Zoning Examiner of the Department of Buildings, be in excess of the height provided in the Zoning Ordinance.

Section 16 of the Ordinance which is the only section specifying the height of water towers reads as follows:

"Section 16. Height of buildings. The maximum height of any building is 25 feet in 1st Volume districts and 45 feet in 2nd Volume districts.

In 1st Volume districts chimneys and similar structures above the roof shall not exceed 66 feet in height, and in 2nd Volume districts shall not exceed 85 feet in height, from the established grade of the lot, but water towers for sprinkler systems may be erected to a height of 60 feet above the height of the roof of the building."

The above quoted section is an amendment to the zoning ordinance, passed by the City Council on November 6, 1946. Prior to the amendment Section 16 read as follows:

"Height of buildings. The maximum height of any building is 25 feet in 1st Volume districts and 45 feet in 2nd Volume districts.

In 1st Volume districts, chimneys, water towers and similar structures above the roof shall not exceed 66 feet in height, and in 2nd Volume districts shall not exceed 83 feet in height, from the established grade of the lot."

Analysis of the language of the original section and the amendment clearly specifies, in our opinion, that the provision as to limitation of height of water towers contained in Section 16 relate only to 1st and 2nd Volume Districts, and that the Zoning Ordinance is silent on the height of water towers in 3rd or 4th Volume Districts.

The City Council proposed an amendment to the Ordinance on November 3, 1947 at page 1134 of the Journal of Council Proceedings, which provided for the same restriction of 60 feet height of water tanks and towers above the roof of buildings in 1st and 2nd Volume Districts, but which also contained the following language:

"No structure of any kind shall be receted, reconstructed, altered or enlarged in any volume district to exceed the height specified in this ordinance for buildings in that volume district, but water towers for fire extinguishing sprinkler equipment may exceed such height not more than 105 feet. * * *

This proposed amendment to the ordinance was passed by the City Council on January 23, 1948, page 1809 of the Journal of Council Proceedings, but was reconsidered February 16, 1948 at page 1919 of the Journal of Council Proceedings, and has since remained dormant.

The regulations as they stand at this time as to the height of water towers do not include any limitation as to height of the proposed water tower at 4902 W. Roosevelt Road, which location is in Volume 4.

The application for the permit indicates that the main structure will be approximately 32 feet in height and that the water tower from grade of 124 feet in height would extend a distance of approximately 92 feet in height above the roof.

In our opinion it is well established that a zoning regulation should describe with certainty the district or districts within which particular restrictions are applicable (62 C. J. S. 434). Zoning regulations are of a regulatory and penal character and are in derogation of common law rights to the use of property (62 C. J. S. 482). Whether a particular use of property is permitted by a Zoning Ordinance or regulation, or is in violation thereof, depends upon the wording, scope and intent of the particular regulation and the nature of the use, or proposed use of the premises by the individual owner. The language of the regulation as to the uses which are permitted or which are prohibited in particular districts will be interpreted according to the common and approved usages of the language without enlargement or restriction (62 C. J. S. 486).

It is, therefore, our opinion that the permit in the instant case should issue for the construction of the proposed building designed to have a water tower approximately 124 feet in height (grade to top of tower) as part of the installation, provided all other applicable ordinances are complied with.

ZONING AT PORT OF CHICAGO

(No. 11886—Commissioner of Public Works—E. W. P.—March 3, 1955.)

We have your letter of February 16, 1955, in which you enclosed a copy of a letter addressed to you from Honorable Frederick T. Aschman, Executive Director of the Chicago Plan Commission. The subject of the inquiry from Mr. Aschman is divided into two questions as follows:

1. Will the City of Chicago be able to zone land devoted to Port District functions?
2. Will the City of Chicago be able to zone Port District property which is leased for industrial and other non-port functions?

Section 1 of Article 73 of the Revised Cities and Villages Act (Ill. Rev. Stat. 1953, ch. 24, par. 73-1) grants zoning powers to the corporate authorities of each *municipality*. Section 2 of Article 1 of said act (Ill. Rev. Stat. 1953, ch. 24, par. 1-2) defines the term "municipality", as used in that act, as a city, village, or incorporated town in the State of Illinois; not including a township, town when used as the equivalent of a township, county, school district, park district, sanitary district, or any other similar governmental district.

Under its enabling statute, the Chicago Regional Port District has specific powers to provide for the port, including the construction of all necessary facilities and to enter into any contract dealing with the objects of the district created under the Act, *et cetera*, but it has no zoning powers (Ill. Rev. Stat. 1953, ch. 19, par. 152-156).

The Supreme Court of this State has never passed upon the precise question presented here, but it has rendered decisions in two cases presenting closely related questions, which decisions would appear to be applicable in the instant case.

In the case of *County of Cook v. City of Chicago*, 311 Ill. 234 (1924), the plaintiff filed a bill to enjoin the City of Chicago from enforcing its fire and building ordinances against the county concerning the construction of a county jail located within the territorial limits of the city. The principal question presented there was whether or not the city council had the power to require an observance of its regulations by the county in the building of the county jail.

The court, noting that the question had never been passed upon in Illinois, held that there is a distinction between municipal corporations proper, such as exist by charters issued by the state, as incorporated towns, cities and villages voluntarily organized under the general Incorporation act, and corporations such as counties and townships, which are frequently referred to as involuntary or *quasi* corporations. The court pointed out that *quasi* municipal corporations, such as counties and townships, being purely auxiliaries of the state, owe their creation to the general statutes of the state, which confer upon them all the powers which they possess. Since the legislature, by statute, had conferred on municipal corporations, such as cities, villages and incorporated towns, the police power to prescribe fire regulations and to regulate buildings within their limits in respect to fire protection, and it had not delegated any police power to the counties and townships of the state, it was clear, the court held, that the legislature intended that the exercise of that power over the property and inhabitants within the limits of the city or village should be by that municipality sub-

ject to the right of the state to exercise the police power. The court said (pp. 246-247) :

"The powers granted to the counties under the general law do not include the police power. The power is granted to cities and villages under the act concerning their incorporation and by that statute it extends to all buildings within its limits. The county is not required to build a court house within the limits of any city but may build it elsewhere if directed so to do by the people, or may maintain or condemn land of its own volition without a vote of the people (*County of Mercer v. Wolff, supra*). When the county builds a court house within the limits of a city it may be held that in so doing it acts voluntarily. No good reason, therefore, is perceived why it should not be made amenable to the reasonable police regulations imposed by the city in the interest of the general welfare.

"It is urged that the county is an arm of the State to which there has been committed the control of the county buildings, and that it is not, therefore, subject to the police power of the city. While the county is an agency of the State it is likewise a creature of the State vested with only the powers conferred upon it by the State."

The respective powers of municipal corporations functioning in common territorial limits were further delineated in the case of *Decatur Park District v. Clara M. Becker, et al.*, 368 Ill. 442, where the plaintiff park district sought to condemn for park purposes a tract zoned as an "A" residence district in which public parks were prohibited. The court held that regardless of the fact that the property in question was zoned as "A" residence property, the park district could condemn and use it *for park purposes*. The court said (p. 447) :

"The appellee is given authority to locate parks, and the city is given authority to adopt a zoning ordinance. The legislature did not empower cities to exclude parks from residence districts. *The two statutes should be construed so that the ordinance of the park district and the zoning ordinance of the city will be given effect in their respective fields of operation.*" (Emphasis added.)

In view of the foregoing, it is our opinion that the Chicago Plan Commission and the City Council should co-ordinate with the Chicago Regional Port District in zoning the land devoted to the port district functions in the classification which would permit the functions of the district.

Relative to your second question as to whether the City of Chicago has power to zone Port District property which is leased for industrial and other non-port functions by the Port District, it is our opinion that when the Port District determines that certain of its properties are no longer required for its specific corporate purposes, and leases the same for industrial or other non-port functions, that said properties have re-entered the field of operation of the City's Zoning Ordinance, and are, therefore, amenable to the same.

DOCTOR'S OFFICE IN SINGLE FAMILY RESIDENCE

(No. 11902—*Commissioner of Buildings*—E. W. P.—May 6, 1955.)

We have before us your letter of May 2, 1955, requesting our opinion as to whether or not the use of the building at 2142 W. 107th Place, Chicago, Illinois in a single family residence district for the operation of a Doctor's office is legal.

You state that the Doctor started to operate his office at 2142 W. 107th Place in the Spring of 1934 and also resided in this building with his family.

You are correct in your statement that under the Zoning Ordinance provisions of 1934 this was legal. The auxiliary uses enumerated under Section 7 of the 1923 Ordinance as related to residences or apartment districts contains the following language:

"The office of a surgeon, physician or dentist, clergyman, lawyer, artist or other professional person, located in the dwelling or apartment used as the private residence of such person;

Customary home occupation located in a dwelling, studio, or apartment and carried on only by the members of the household of the person occupying such dwelling, studio, or apartment as his private residence; * * *

The Doctor continued the use of his office in the dwelling used as his own private residence until approximately January 1, 1945 according to the data which you submitted to us. In 1945 he moved with his family from the residence at 2142 W. 107th Place. Therefore, subsequent to January 1, 1945, the Doctor discontinued his use of 2142 W. 107th Place, as his private residence but continued to use this location for his expanded practice as a Doctor and has so continued until the present date. He, therefore, abandoned his legal non-conforming use of the premises at 2142 W. 107th Place.

He continued to legally use the dwelling at this address as an office, which use he had established in 1934, only so long as he also maintained space in the dwelling as his own private residence.

The building was designed and arranged as a single family dwelling house in a single family dwelling district. Section 19 of the present Ordinance specifies that if a non-conforming use has been discontinued for a period of two years or more, it shall not be re-established unless the *non-conforming use* was in a building designed, arranged and maintained for such use.

Under the present Ordinance, in a single family residence district, a Doctor may use a dwelling for his professional services only when it is his residence, and then only for consultation or emergency treatment.

It is, therefore, our opinion that there is no longer in existence a legal non-conforming use on the premises at 2142 W. 107th Place for the reason that the Doctor discontinued a legal non-conforming use on the premises in 1945 and from thence for a period of ten years, and that the Doctor is in violation of the Chicago Zoning Ordinance, and that action should be taken to compel him to comply with the Ordinance.

CHICAGO'S ZONING LIMITS

(No. 11929—City Plan Commission—L. H. G.—July 20, 1955.)

We have your letter of July 9, 1955, in which you inquire as to the zoning limits of the City of Chicago.

The Zoning Enabling Act, Chapter 24, Article 73, Illinois Revised Statutes, gives the corporate authorities power to zone in each municipality. The power to zone is limited to the Municipal limits. Chapter 194, 6.3 Municipal Ordinance states:

"For the purpose of regulating and limiting use of lot areas * * * the City of Chicago is divided into 10 classes of use districts * * *

Chapter 4 of the Municipal Code of Chicago entitled "City Council" states:

"4-13. The City is divided into 50 wards * * *

Section 4-14 to 4-63 sets out the boundaries of the wards. In each instance the boundary line of wards that lie along Lake Michigan are listed as the shores of Lake Michigan. Therefore, it is our opinion that zoning is restricted to the present shore line of Lake Michigan at this time.

The cases of *People v. Kirk*, 162 Ill. 138 and *Illinois Cent. R. Co. v. Ill.*, 146 U. S. 387, hold that the State holds title to submerged land and the State may dispose of the submerged land in any manner which does not materially affect or impair the public interest in navigation, commerce and fishing.

Chapter 24, Cities and Villages Act, Sections 49-11, entitled "Reclamation of submerged land under public waters—Exceptions.) reads as follows:

"For the purpose of constructing water purification plants and acquiring or constructing wharves, piers, docks, levees, or in connection with wharves, piers, docks, levees, elevators, warehouses, vaults, or necessary and appropriate tracks or terminal facilities, any municipality may reclaim the submerged land under any public waters within the jurisdiction of or bordering upon the municipality, and thereupon shall be vested with the absolute title, *in fee simple*, to the land so reclaimed. * * *. Nothing contained in this section, however, shall give to any municipality the right to acquire submerged land from any park district where any grant heretofore has been made of this submerged land to the park district, and the grant has been accepted by the park district."

"Section 7-7. Annexation of owned territory.) Whenever any contiguous, uninhabited, unincorporated territory is owned by any municipality, that territory may be annexed by that municipality by the passage of an ordinance to that effect, describing the territory to be annexed. A copy of the ordinance, with an accurate map of the annexed territory shall be recorded with the recorder of deeds of the county wherein the annexed territory is located."

From the foregoing, it follows that the City of Chicago does not have the power to zone beyond the ward limits, but these limits may be extended by annexation in accordance with sections 49-11 and 7-7 as above set forth. Upon obtaining fee simple title to the submerged land or man made island as provided in section 49-11, the City could annex the property pursuant to section 7-7, and the land would then become part of the City of Chicago and amenable to the City's zoning jurisdiction.

APPEALS BOARD PROCEDURE CHANGE

(No. 11933—Chairman, Zoning Board of Appeals—E. W. P.—August 11, 1955.)

We have your letter dated July 13, 1955, relative to Senate Bill No. 328, effective July 1, 1955, under the provisions of which Bill, the Board of Appeals, Zoning, has the power and duty of making final decisions, allowing or denying applications for variations in the manner and under the conditions set forth in Senate Bill No. 328.

You request an opinion from the Corporation Counsel as to action to be taken by the Board upon applications for variations which were filed with the Board of Appeals, Zoning, prior to the effective date of the Act, but upon which no action had been taken by the Board at that date.

The general rule of construction is that statutes are not to be given retrospective operation except where it is manifest that the Legislature in-

tended that they should have such operation. It is not competent for the Legislature to give such operation to an act where it will affect existing or vested rights; a "vested right" being an immediate fixed right to a present or future enjoyment (*City of Chicago v. Collin*, 302 Ill. 270).

However, when a change of law merely affects remedy or law of procedure, all rights of action will be enforceable under the new procedure without regard to whether they occurred before or after such change of law and without regard to whether suit has been instituted or not unless there is a saving clause as to existing litigation (402 Ill. 291; 378 Ill. 203). Statutes which merely change procedure should be complied with as far as practicable in all pending and undetermined causes (*McQueen v. Connor*, 385 Ill. 455). In *City of Chicago v. Industrial Commission*, 292 Ill. 409, our Supreme Court said:

"This court has repeatedly held that the law is well settled that there can be no vested right in any particular remedy, method or procedure, and 'that while the general rule is that statutes will not be so construed as to give them a retrospective operation unless it clearly appears that such was the legislative intention, still when the change merely affects the remedy or the law of procedure, all rights of action will be enforceable under the new procedure, without regard to whether they occurred before or after the change in the law, and without regard to whether suit has been instituted or not unless there is a saving clause as to existing litigation'." (Citing cases.)

The law here in question contained no saving clause as to existing litigation, but merely changes procedure by establishing a different forum for granting or denying applications for variations. No rights of an applicant for a variation are affected or impaired regardless of when his application was filed.

In our opinion the Board of Appeals should pass on applications filed with it under the prior law, in conformity with the law now in effect.

JOINT COMMITTEE—VARIATION REFERRALS

(No. 12005—Committee on Building and Zoning—A. F. G.—January 26, 1956.)

We have your letter of January 19, 1956, to which was attached a resolution introduced in the city council on December 1, 1955. The resolution requests the zoning board of appeals to refer all applications for special uses and variations coming before it to the joint staffs of the Chicago Plan Commission and the rezoning staff of the Committee on Building and Zoning for their opinion as to the probable effect on the neighborhoods and adjoining properties resulting from the granting of said special uses and variations. The resolution further provides that the opinions if given to the board of appeals by the said joint staffs shall be advisory only and for the sole purpose of aiding the board in its deliberations. You request our opinion on this matter.

You do not state on what phase of the matter you want an opinion. If you want to know if the council has power to pass the resolution our answer is in the affirmative. The resolution is merely an expression of opinion of the council and by its language is not binding on any body. If the resolution was made binding on the board of appeals it would amount to an amendment of the ordinance setting out the powers of that board, and under the well established rule that an ordinance cannot be amended by a resolution we would have to hold that the resolution was beyond the power of the council to pass.

Section 24 of the Chicago Zoning Ordinance is in part as follows:

"Subject to the rules set forth in this Section 24, the Board of Appeals shall approve any special use of any lot area or building within any use district if, after a public hearing pursuant to notice as provided by the laws of this State in cases of variations, it has determined that the special use is necessary at that location for public convenience."

The section then provided that no special use shall be approved in certain enumerated districts with certain exceptions. An exception in Apartment House Districts permitted the approval of a "telephone exchange".

An application for the approval by the Board of Appeals of the location of a telephone exchange (a special use) in an Apartment House District, 2nd Volume, was denied by the board for the reason the building would exceed the volume and height restrictions of the zoning ordinance. The evidence before the board showed that the special use of the particular location was necessary for public convenience.

The Supreme Court of this state in *Illinois Bell Telephone Co. v. Fox*, 402 Ill. 617 held that there was conclusive proof that the erection of a telephone exchange was necessary at the proposed site, for public convenience, and there being no evidence to the contrary, the board had no discretion to deny the plaintiff's application. As section 24 provides that the "board of appeals shall approve any special use" where the use is necessary for public convenience and upon the affirmative showing made by plaintiff, it became mandatory for the board to approve the application for a special use. It would appear to be an idle gesture for the board to request the joint staffs for recommendations to guide its discretion, when as the decision points out the board has no discretion in the matter.

Prior to July 1, 1955, the Chicago city council, by ordinance, enacted pursuant to section 73-4 of the Zoning Statute, was authorized to grant variations from the regulations imposed by the zoning ordinance, in cases where there are practical difficulties or particular hardship in the way of carrying out the strict letter of the regulations relating to the use, construction, or alteration of buildings or structures or the use of land. However, no such variation could be made by the city council, as specified, without a hearing before the board of appeals.

At its last session the General Assembly amended the first paragraph of section 73-4 of the Zoning Statute so as to divest the city council of its power to grant variations and provided that only the board of appeals could exercise that authority. The section as amended set up strict rules to guide the board, reading as follows: "In its consideration of the standards of practical difficulties or particular hardship, the board of appeals shall require evidence that (1) the property in question cannot yield a reasonable return if permitted to be used only under the conditions allowed by the regulations in that zone; and (2) the plight of the owner is due to unique circumstances; and (3) the variation, if granted, will not alter the essential character of the locality. A variation shall be permitted only if the evidence, in the judgment of the board of appeals, sustains each of the three conditions enumerated."

The Legislature having set up the rules it deemed necessary to guide the board of appeals, in considering variations, we question the advisability of the resolution which imposes new requirements. We are advised that the Board of Appeals now refers a copy of each application for variations filed with it, to the joint staff of the Chicago Plan Commission and the members of that staff are free to appear at the public hearings and give testimony on the pending applications, and so the resolution which directs the Board to do something it now does, appears to be unnecessary and might be considered a reflection on a Board which is carrying on its work with a minimum of criticism.

For the foregoing reasons we are of the opinion the resolution should be placed on file.

EFFECTIVE DATE FOR COMPREHENSIVE ZONING ORDINANCE

(No. 12130—*Commissioner of Buildings—E. W. P.—June 27, 1957.*)

We have your letter of June 26, 1957 in which you request us to advise you as to the exact day and hour of the effective date of the new Comprehensive Zoning Ordinance. The Ordinance was published today, June 27, 1957 and becomes effective ten days from today. The effective date falls on Sunday, July 7, 1957. It is not necessary, therefore, for us to compute the exact hour, inasmuch as for all purposes the first hour that it becomes effective is the commencement of the first working hour in all of the departments of the City, on Monday, July 8, 1957.

AIR NAVIGATION FACILITY

(No. 12135—*Committee on Aviation—J. E. S.—July 11, 1957.*)

In your letter of June 21, 1957 it was requested that this office prepare and submit to the Committee on Aviation of the City Council of the City of Chicago, an opinion as to the legality of a proposed installation by the Civil Aeronautics Administration, United States Government, of an ILS, Middle Marker on a garage located at 6615 South Kilbourn Avenue, Chicago, Illinois, said garage being located in a district zoned R2, Single Family Residence District.

The Civil Aeronautics Administration is an agency of the United States Government created pursuant to the provision of the Civil Aeronautics Act of 1938 (49 U. S. C. 401 *et sub.*).

Under the provisions of said Act the Administrator of Civil Aeronautics is specifically authorized to acquire, establish, improve, operate and maintain air navigation facilities wherever necessary, and to acquire by purchase, condemnation, lease or otherwise, real property or interests therein, including, in the case of air navigation facilities owned by the United States and operated under the direction of the Administration, easements through or other interests in airspace immediately adjacent thereto and needed in connection therewith (49 U. S. C. 452).

The desired ILS Middle Marker installation would be owned by the United States, operated under the direction of the Administrator and located on property leased by the Administrator.

Said installation is an air navigation facility intended to promote safety both in flight and otherwise, to insure with more certainty the regulation of air commerce and to lend improvement generally to the national system of air navigation.

Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. The privileges, rights and protections are afforded by and owed to the Federal Government alone. Local exactions and barriers to free transit in the air would neutralize the indifference to space and conquest of time of air navigation.

Northwest Airlines v. Minnesota, 322 U. S. 292.

Allegheny Airlines Inc., et al. v. Village of Cederhurst, 132 Fed. Supp. 831.

The supremacy clause (Article VI) of the Constitution of the United States removes all state obstacles to the performance by the Federal Government of any of its functions and so modifies every power vested in subordinate government as to exempt its own operations from their own influence.

McCullough v. State of Maryland, 4 Wheat 316.

A corollary of the principle of Federal Immunity is the disqualification of the State, either under its police power or under its taxing power from interfering with the property, operation or functions of the United States.

State of Ohio v. Thomas, 173 U. S. 276.

State of Arizona v. State of California, 283 U. S. 441.

Mayo v. United States, 319 U. S. 441.

Municipal zoning in its ordinary form is an exercise of the police power in a particular field.

8 McQuillan, Sec. 25.05, 3rd Ed.

A municipal zoning ordinance, however, even if based on the valid police power of a state, must yield in case of direct conflict with the exercise by the Government of the United States of any power it possesses under the Constitution.

United States v. City of Chester, 144 Fed. 2nd 415.

Rainbow Realty Co. v. Tennessee Valley Authority, 124 Fed. Supp. 436.

Thus, in the instant matter the installation of subject ILS Middle Marker is a proper exercise by the Government of the United States of a power properly possessed and the zoning restrictions being in apparent conflict therewith must yield.

It is our opinion, therefore, in answer to your query, that the Civil Aeronautics Administration may legally erect an ILS Middle Marker on a garage located at 6615 South Kilbourn Avenue, Chicago, Illinois, in an area zoned R2, Single Family Residence District without regard to the limitations imposed by such zoning.

CONSTRUCTION ON UNRECORDED LOT

(No. 12159—Department of Buildings—J. P. M.—August 29, 1957.)

Your letter of August 23, 1957 is hereby acknowledged. With that letter you enclose a copy of a letter from one Theron L. Rathje along with a survey and surveyor's notice which covered the property at 118th Street and S. Longwood Drive, which is located in a R-1 district. The letter from Mr. Rathje raises the question as to whether a person may erect a single-family residence on a plot of ground which is not a lot of record. Please be advised that the 1957 compressive amendments to the Chicago Zoning Ordinance defines a zoning lot as

"A 'zoning lot or lots' is a single tract of land located within a single block, which (at the time of filing for a building permit) is designated by its owner or developer as a tract to be used, developed, or built upon as a unit, under single ownership or control. Therefore, a 'zoning lot or lots' may or may not coincide with a lot of record."

The ordinance defines a lot of record as

"A 'lot of record' is an area of land designated as a lot on a plat of subdivision recorded or registered, pursuant to statute, with the Recorder of Deeds of Cook County and the Ex-officio Examiner of Subdivisions of the City of Chicago."

The ordinance defines a lot as

"A 'lot' is a zoning lot except as the context shall indicate a lot of record, in which case a 'lot' is a lot of record."

It, therefore, follows that unless the context of the ordinance mentions a lot of record a lot spoken of in the record is a zoning lot.

Section 7.5 (5) of Article VII of the Chicago Zoning Ordinance states:

"In all residence districts, no detached residential buildings shall be erected on a lot, other than a lot of record on the effective date of this comprehensive amendment which is less than 5,000 sq. ft. in area."

Section 7.5-1 states "that in a R-1 district the minimum lot area for a dwelling unit is 6250 sq. ft."

It is, therefore, the opinion of this office that if the lot area is not less than 6250 sq. ft. a permit should be issued for the erection of a single-family residence regardless of whether or not the lot on which the premises are to be built is a lot of record, and as long as the lot is a single tract of land located within a single block.

RECOMMENDATIONS ON ZONING AMENDMENTS

(No. 12161—Commissioner of City Planning—J. C. M.—September 9, 1957.)

In answer to your memorandum of September 6, 1957 relative to submitting itemized routine zoning amendments to the Chicago Plan Commission for recommendations, be advised that we are of the opinion that such zoning amendments need not be so referred.

Section 7.1-5 of the Municipal Code of Chicago relates to projects generally affecting all the people in the City of Chicago. There is no harm, of course, in submitting to the Chicago Plan Commission any matter that may help you to make a recommendation or decision, but the decision or recommendation must be your responsibility under the Comprehensive Zoning Amendment.

You will note that in setting forth the powers and duties of the Plan Commission under Section 21-43 (4) b, the Commission is to report "the status and effectiveness of the Chicago Zoning Ordinance". Reading all these ordinances together, it appears to us that the responsibility for recommendations for or against amendments to the Zoning Code provisions rests upon you and the Zoning Administrator.

TRUCKS ON GAS STATION PREMISES

(No. 12168—Alderman, 50th Ward—J. P. M.—October 15, 1957.)

We acknowledge receipt of your recent letter in which you request an opinion as to whether a gas station in a C-1 District may store and park large trucks and other motor vehicles on the premises on which the gas station is located in return for the purchase of gas or direct rental of space.

Section 9.3-1 permits among other uses in a C-1 District:

“Garages and Parking Lots, other than accessory, for the storage of motor vehicles and subject to the provisions of Section 9.11.”

“Accessory uses.”

Section 3.2 states: “An accessory building or use includes but is not limited to the following:

g). Off-street motor vehicle parking areas and loading facilities.”

Under the terms of the Chicago Zoning Ordinance the parking of motor vehicles on the same zoning lot as the gas station, is an accessory use permitted in a C-1 District subject to Section 9-11.

Section 9-11 of the Chicago Zoning Ordinance provides in part as follows:

“Off-street parking spaces for private passenger automobiles only, unless otherwise specified, and accessory to uses allowed in a Commercial District shall be provided in accordance with the regulations set forth hereinafter as well as in Article 5, Section 5.8-1 to 5.8-6. * * *

The remainder of this provision deals with the size, access, design and maintenance of the off-street parking facility. It should be noted that the parking of trucks is not allowed in a C-1 District, but only the parking of private passenger automobiles.

It is, therefore, the opinion of this office that the parking of vehicles other than private passenger automobiles is a violation of the Chicago Zoning Ordinance and further that the parking of private passenger automobiles is subject to the provisions of Sections 5.8-1 to 5.8-6 and 9-11 of the Chicago Zoning Ordinance.

COMPREHENSIVE ZONING CODE—STATUS OF PRIOR PERMITS

(No. 12171—Commissioner of Buildings—J. C. M.—October 24, 1957.)

With your letter of October 22, 1957, you transmitted a copy of a letter dated October 21, 1957 addressed to you by Mr. Leonard H. Lawrence, attorney representing the owners of the property known as 26-32 East Elm Street, Chicago, Illinois.

From the data furnished, it appears that Permit No. B-209904 to construct a foundation on the premises was issued on January 25, 1957 or thereafter. Under the ordinance then in effect, the permit would be voided at

the end of six months from its issuance unless construction work was commenced. It appears from your letter that you notified the owners that the permit had been cancelled. No date of cancellation is given.

The Comprehensive Amendment to the Zoning Code, Article 5.3, effective July 8, 1957, provides that if a permit for a building or structure has been issued according to law prior to the effective date of the amendment and construction is begun within one year of the effective date of the amendment, said building or structure may be completed.

Since Permit No. B-209904 was in effect on the effective date of the amendment, it appears that the time within which construction work must begin is extended to one year from July 8, 1957.

It further appears from the data furnished that after the permit was issued, the owners incurred expenses in excess of \$200,000.00 which included test borings, the letting of a construction contract, the obtaining of a Federal Housing Authority mortgage, the construction of a work office upon the land and other matters. Such expenditures would estop the City from legally cancelling a permit.

We agree with you and it is our opinion that the facts justify the issuance of necessary permits to permit the construction and completion of the structure upon the premises in question.

GASOLINE IN APARTMENT GARAGE

(No. 12173—Commissioner of Buildings—E. W. P.—October 28, 1957.)

In the above case which concerns the premises on Sheridan Road between Ardmore Avenue and Thorndale Avenue, improved with a brick, steel and concrete fireproof building having thirteen floors above grade and containing about 187 apartments, the Court reversed the judgment order entered by the Circuit Court that the plaintiffs had a clear legal right to maintain and conduct a garage on the premises for the accommodation of the tenants of the said building and their guests, and to maintain therein underground tanks and store gasoline therein for sale only to the occupants of said private garage as auxiliary and incidental to the maintenance and operation of said private garage and without advertising the same or displaying any notice on the outside of the building to the effect that gasoline is available on the premises. This decision of the Supreme Court was rendered April 17, 1957. Petition for rehearing was filed and the petition for rehearing was recently denied.

You now advised that the plaintiffs have re-applied for a permit for the installation and maintenance of gasoline filling tanks in the building for the use of the occupants therein in the same manner as they applied originally. They take the position that they have a right to this use under the Zoning Ordinance of 1957, Section 7.12, sub-section 8-f at reference page 76A, which provides as follows:

"Repair and Service. No motor vehicle repair work or service of any kind shall be permitted in conjunction with parking facilities provided in Residence Districts, except that where such facilities are enclosed in a building, gasoline and motor oil may be sold within such building to the users of said facilities provided that no sign advertising the sale of same is visible from outside, and provided further, that all gasoline pumps shall be effectively screened from view from the public way."

It would seem at first glance that the interpretation of the applicants was correct. However, in the Zoning Ordinance, at reference page 34A, Section 5 (2), there appears the following language under interpretation:

"Where the conditions imposed by any provision of this comprehensive amendment upon the use of land or buildings or upon the bulk of buildings are either more restrictive or less restrictive than comparable conditions imposed by any other provision of this comprehensive amendment or of any other law, ordinance, resolution, rule or regulation of any kind, the regulations which are more restrictive (or which impose higher standards or requirements) shall govern."

Section 127-5 requires frontage consents for the storage and handling of flammable liquids within a perimeter of 150 feet of the proposed location. The same section also provides as follows:

"Except as otherwise permitted by Chapters 51 and 29 of this Code, storage of flammable liquids shall be outside of buildings."

There is no provision contained in Chapters 51 and 29 of the Municipal Code which would grant the petitioners any right whatsoever in locating storage of flammable liquids in the premises and the provisions of the Code being more restrictive than the provision contained in Section 7.12 sub-section (f) would govern and the applicant has no right to establish or maintain the installation of gasoline tanks inside the building. Even though the applicants would have the right to do so they could not qualify unless they obtained frontage consents immediately prior to their application.

However, it is our opinion that Section 7.12, sub-section (f) of the 1957 Ordinance is very unfortunate. The first permitted use for a gasoline filling station is contained within the provisions of B4 of the Ordinance. The present section of the Ordinance on page 76A with reference to the use of gasoline filling tanks within a residential building should be repealed but in the meantime the restriction in the Municipal Code against this use in a residential building must be enforced.

An added reason for our opinion is contained within the language of the recent case decided by the Supreme Court, September 25, 1956, which language states as follows as the Court had denied the petitioner the right to store and handle gasoline within a residential district:

"Judicial notice must be taken of the fact that the business of storing and handling gasoline at filling stations within a City is attended with a factual degree of danger to life and property, and that the noxious odors * * * from the conduct of such a business are incompatible with a residence district."

Under all of the circumstances it is our opinion that the application of the petitioners for installation of gasoline tanks within this building should be denied.

CHICAGO PUBLIC LIBRARY—ZONING EXEMPTION

(No. 12181—Chicago Public Library—J. C. M.—November 19, 1957.)

On November 14, 1957 you requested an opinion on behalf of The Chicago Public Library relative to the application of the Comprehensive Zoning Amendment, 1957, to a proposed branch library to be erected at 6907-17 North Clark Street, Chicago, upon property purchased by the City of Chicago on behalf of the Chicago Public Library in 1954 for a branch library.

You advise us that it has been determined by The Chicago Public Library Board that this site be used for the construction of a branch library building, that plans for construction were prepared and approved by the Library Board and Paul Gerhardt, City Architect, on May 15, 1957, which was prior to the effective date of the Comprehensive Zoning Amendment.

The question involved is whether the provisions of the present zoning ordinances apply to The Chicago Public Library which is a part and parcel of the municipal government of the City of Chicago.

It is the established law that the zoning ordinances do not apply to the federal government, the state government or the municipal government when the latter is in the exercise of governmental functions (*Nehrbas v. Incorporated Village*, 159 N. Y. S. (2d) 145). The determination of when a municipal government is acting in a governmental or a proprietary capacity usually presents many difficult problems which the courts are not in accord. We are not unmindful of the decision of *Johnson v. City of Chicago* (1913), 258 Ill. 494, which merely decided that the City of Chicago was liable for the negligence of the drivers of delivery trucks operated by The Chicago Public Library, and the later case of *Gebhardt v. The Village of LaGrange Park* (1933), 354 Ill. 234, where the court held that "the nature and effect of the function discharged must be examined to determine that question (whether the Board is acting in a governmental or proprietary capacity). * * *. Such function (operation of a swimming pool) in nowise partakes of the nature of a corporate business or undertaking for profit but is by its nature, a public benefit. The municipal purpose in providing such means of recreation and health differs widely from that found in conducting a business enterprise for private gain." The court then held that the operation of a swimming pool, even though an admission fee was charged, was governmental and not proprietary because the construction and operation thereof was for the general public welfare. Under the statute on libraries, it is stated that libraries are operated for the benefit of all people of the municipality.

The mere fact that a municipal corporation may be liable in tort for a negligent act of an employee does not necessarily mean that the municipality, in the operation of that function, is not exercising some governmental powers. The tort liability is based upon the fact that the ministerial act being performed by the employee is not considered the exercise of governmental powers.

However, it has been held that where the municipality is exercising a judgment or discretion, its action is judicial and not ministerial. The statute (Chap. 81, Sec. 13, Ill. Rev. Stats., 1957) clothes the Board of Directors of any public library with these discretionary powers. A corporation acts judicially or exercises discretion when it selects the site and adopts a plan in the making of public improvements because it must exercise a judgment or discretion (*City of Chicago v. Sebin*, 165 Ill. 371).

It is our opinion that in the selection of the site, the preparation and approvals of the plans by the Board of The Chicago Public Library and the City Architect was the performance of a judicial act requiring judgment or discretion and that the zoning laws have no application thereto. It is our further opinion that the Commissioner of Buildings should issue necessary permits for the construction of said public library without regard to the provisions of the Zoning Code.

STATE OF ILLINOIS—ZONING EXEMPTION

(No. 12186—Committee on Building and Zoning—E. W. P.—December 5, 1957.)

You recently made an oral request for an opinion as to whether or not the Secretary of State of the State of Illinois, by virtue of legislation of the General Assembly to select a site for a building and testing lanes for motor vehicles, should be permitted to establish and maintain these governmental functions on the site which has been designated by the Secretary of State.

We are advised that the site selected, now being purchased from the Board of Education by the State, is located at Lexington, Fifth Avenue, S. Lockwood (and S. 53rd Avenue), which covers an area of a full one and one-half block square, appearing in Map 98B of the Zoning Ordinance. Part of this tract South of Polk Street to Fifth Avenue is zoned M1-2 and from Polk going North to Lexington is within an R3 classification. This R3 land is vacant and immediately to the North thereof for a full block it is zoned M1-2. Railroad freight lines are to the immediate South of the property. If the vacant property now zoned for R3 and surrounded by manufacturing uses had been zoned M1-2, there would be no problem presented.

We would have an exceedingly hard time attempting to justify the R3 classification. Were the situation different and the property was zoned for residential and could be readily used for that purpose, we would be justified in refusing to permit the testing lanes to be located there and have the matter determined by the courts. This, however, would be a very weak case to test our right to have a zoning ordinance take precedence over State requirements. In addition to this the prevailing weight of authority in many other States is that local zoning enactments are not applicable to the activities of Federal or State governments.

Further, we have consulted with the Attorney General of the State of Illinois who has advised us:

"In this connection, the Illinois courts follow the well established doctrine that general legislative enactments are not applicable to the State, its property or activities, unless such intent is clearly expressed. *People v. Oregon State Bank*, 357 Ill. 545; *Institution for the Blind v. Louisville*, 123 Ky. 767."

In view of all of the circumstances surrounding this inquiry, with particular emphasis on the desired location for the site, we are of the opinion, *in this instance only*, that permit should be issued for the establishment and maintenance of the use requested by the State through its official, without reference to the provisions of the Zoning Ordinance.

CITY OF CHICAGO—ZONING EXEMPTION

(No. 12188—Commissioner of Water and Sewers—E. W. P.—December 9, 1957.)

We have your letter of September 30, 1957 advising that the Water Fund purchased the block between 84th and 85th Streets between South Kedvale and South Keeler Avenues, as the proposed site for the Southwest Pumping Station. You advise that the question has come up regarding whether there is a conflict in the zoning of the property.

The site is within a solid R2 (restricted residential use), from 79th Place on the north to 8650 on the south and Keating on the west, Komensky on the east (4032 W. to 4732 W.). However, the use contemplated is a vital governmental function for the service of a large area.

Under the zoning ordinance a water pumping station may be declared as a special use which would require notice to all property owners within 250 feet of the site prior to application before the Zoning Board of Appeals for approval or disapproval. However, clearly the use of the site which you have purchased for a pumping station is a governmental function, and it is the opinion of the office of the Corporation Counsel that the zoning ordinance does not apply to the City of Chicago in the exercise of governmental functions. A municipal corporation acts judicially or exercises discretion when it selects the site and adopts a plan in the making of public improvements because it must exercise a judgment or discretion (*City of Chicago v. Sabin*, 165 Ill. 371).

It is our opinion that in the selection of the site and its purchase, and the plans you have made for the construction of the Southwest Pumping Station at this location was the performance of a judicial act requiring judgment or discretion and that the zoning ordinance has no application thereto. It is our further opinion that permits for the construction of said pumping station should be issued without regard to the provisions of the zoning ordinance.

BOARD OF EDUCATION—ZONING EXEMPTION

(No. 12190—Commissioner of Buildings—E. W. P.—December 9, 1957.)

We have your letter of November 27, 1957 in which you request an opinion on zoning in order to permit a new school to be erected on the site of the old Skinner School at the northwest corner of Jackson Boulevard and Aberdeen Street. You attach written instruments demonstrating the plan to wreck the old Skinner School (100 years old) of April 25, 1956, and site plan dated March 19, 1956 indicating the intent of the Board of Education to clear the site.

Under the zoning ordinance, the location of a school in an M1-3 district is not permitted unless it is a trade school. However, the Board of Education of the City of Chicago is a body politic and corporate under the provisions of Chap. 123, Art. 34 of the Revised Statutes of the State of

Illinois, and the Board is vested with the power to erect, purchase and locate free schools and accessory facilities. Article 34-16 provides that no power vested in the Board or in any of its officers, agents, or employees shall be exercised by the City Council. It is also established that where a municipality is exercising a judgment or discretion, its action is judicial and not ministerial. A body politic and corporate acts judicially or exercises discretion when it selects the site and adopts a plan in the making of public improvements because it must exercise a judgment or discretion (*City of Chicago v. Sebin*, 165 Ill. 371).

It is our opinion that in the demolition of the old school, and the selection of the same site for the new school, the preparation and approval plans by the Board of Education of the City of Chicago, was the performance of a governmental function within the expressed powers of the Board, and that the zoning ordinance has no application thereto. It is our further opinion that you should issue necessary permits for the construction of the school, without regard to the provisions of the zoning ordinance.

We are returning the data that you enclosed with your letter.

POST OFFICE—ZONING EXEMPTIONS

(No. 12192—Postal Inspector—E. W. P.—December 16, 1957.)

Your correspondence, including your letter of June 25, 1957 to Hon. Richard J. Daley, Mayor of the City of Chicago, and response thereto from Hon. Ira J. Bach, Commissioner of City Planning of the City of Chicago, relating to proposed improved postal facilities for the area served by Elston Station to be located at 3100 to 3124 W. 47th Street, Chicago, Illinois has been referred to the Corporation Counsel for consideration relating to zoning. We note that you propose to erect a post office on the northeast corner of 47th Street and Troy Street, and use the other lots to the east in the same block to Albany Avenue for off-the-street parking.

The subject property is located under the comprehensive zoning ordinance in an R-3 district which if applicable could preclude the use of a site for a post office, which use however is permitted in a B-2 to B-7 and in C-1 to C-3 Districts. Immediately to the west of the site the zoning is B4-1 and to the south, across the street from Kedzie to California Avenue is zoned for M2-2, a general manufacturing district and C4, a motor freight terminal district.

However, it is the established law that zoning ordinances do not apply to the Federal Government when it is in the exercise of Governmental functions, *Nehrbas v. Incorporated Village*, 159 N. Y. S. (2d) 145. The establishment of a post office at the site indicated is by its very nature, a public benefit, and would not in our opinion be incompatible with the surrounding uses. Commissioner Ira J. Bach has already advised you that this site for a post office would not interfere with any other city planning.

It is our opinion that the Commissioner of Buildings should issue necessary permits for the construction of a post office and other auxiliary requirements without regard to the provisions of the zoning ordinance and we are so advising him.

MUNICIPAL PROJECTS—ZONING EXEMPTION

(No. 12199—City Architect—E. W. P.—January 31, 1958.)

We have your letter of January 29, 1958, in which you request an opinion relating to the application of the new zoning ordinance as it relates to the construction or location of municipal buildings and other municipal projects.

It is unnecessary for the purpose of this opinion to discuss any specific provision of the zoning ordinances or statutory requirements for notice on variations. This entire basic subject refers to the exercise of governmental functions by the City of Chicago. It is the established law that zoning ordinances do not apply to the municipal government when the latter is in the exercise of governmental functions (*Nehrbas v. Incorporated Village*, 159 N. Y. S. (2d) 145).

The determination of when a municipal government is acting in a governmental or a proprietary capacity sometimes presents difficult problems but municipal buildings used for purposes, such as fire stations or police stations clearly fall within governmental function and are immune from the application of the zoning ordinance.

We shall recommend amendments to the zoning ordinance so as to eliminate classifications of these functions by the City as special uses under the ordinance.

We are transmitting copies of this letter to the Building Commissioner, Zoning Administrator, and the Committee on Buildings and Zoning of the City Council. You need not await the passage of the amendments, because the building projects that you have in mind can proceed by permit without application to the ordinance.

PERMIT ISSUED UNDER EXISTING LAW

(No. 12211—Zoning Administrator—E. W. P.—March 12, 1958.)

We have your letter dated January 24, 1958, relating to the issuance of a permit to erect a one-story office and warehouse building at 5724-48 North Pulaski Road, which location is within an M2-1 District as shown on Map 24B of the Chicago Zoning Ordinance.

You advised that Alderman Buckley presented to the City Council on June 7, 1957 an amendment to change the M2-1 Use to an R3 Use and that a public hearing was held to consider this amendment on August 23, 1957 by the Committee on Buildings and Zoning and that the amendment is still pending. You advised further that the use of a one-story office and warehouse building at this location is permitted in an M2-1 Use. It would not, of course, be permitted in an R3 Use District.

You request our advice as to whether or not the permit which was issued on January 3, 1958 should be revoked in view of the pending amendment. Please be advised that if applications are made for permits they must be granted if they conform to the present Code provisions. The fact that there is an amendment pending in the City Council in no manner deprives the property owner from his right to have the permits issued under the existing law.

Since the permit was granted in conformance with the ordinance as it exists and in view of the fact that the amendment to the ordinance is still pending, the permit could not be revoked and the construction stopped. We do not know how far the work has proceeded, but should there be any substantial right established prior to the passage of the amendment, if it should pass, the property owner would obtain a legal right to continue his use, subject to amortization under the ordinance as a legal non-conforming use.

ZONING AND ANNEXATION

*(No. 12222—Commissioner, Department of City Planning—E. W. P.
—May 6, 1958.)*

We have your letters dated April 3 and April 30, 1958, with reference to zoning and annexation procedures. Section 5.4 under the general provisions of the Chicago Zoning Ordinance provides that prior to the annexation of any territory to the City of Chicago a plan to zone the area to be annexed shall be forwarded to the City Council by the Commissioner of City Planning. This plan, of course, would be based on the realization of the sixteen points covered in the zoning ordinance in Article 2 under Intent and Purpose and in order to have the full facts before you all data must be submitted to you including the services to be furnished by the City Departments as well as the Board of Education, the Chicago Park District and other municipalities that would be affected by the proposed annexation.

Each instance would be different as to relationship to the services to be furnished and when the proposed ordinance reaches your department for consideration as to zoning, the services as well as the classification would have to be determined by your department in consultation with the Zoning Administrator.

The zoning ordinances in our opinion would have to be separate from the annexation ordinance for several reasons. The statutory requirements for publication and public hearings on the zoning of the annexed area must be complied with and it would be cumbersome and impractical for both ordinances to be handled as a packaged deal. Further, depending upon the amount of area and the established uses and other factors as to land use, it may well be that there may be several classifications as to zoning of the annexed land. Then, too, the ward boundary in which various parcels of annexed land would fall must be determined.

Under the ordinance, the Commissioner of City Planning has the duty to make an investigation relative to any amendment and to make recommendations thereon and to forward through the Zoning Administrator such recommendations to the Committee on Buildings and Zoning, as set forth in Sections 11.9-5 through 11.9-7 of the ordinance. The proposed zoning of annexed land is an amendment to the ordinance and follows the same procedure.

SIGN PERMIT REVOCATION

(No. 12258 — Chairman, Committee on Buildings and Zoning — E. W. P.—November 24, 1958.)

We have before us your letter of October 28, 1958, in which you advised that you have for consideration, among other matters, a resolution introduced by Honorable Seymour F. Simon, Alderman of the 40th Ward, which would direct the Commissioner of Buildings to revoke immediately all permits that were issued for signs in the area bounded on the south side of Devon Avenue, the alley south of and parallel to Devon Avenue, the east side of N. Avers Avenue and the west side of N. Hamlin Avenue, which area is zoned R-3 General Residence District, which project more than two inches beyond the property line into the public way. In this resolution reference is made specifically to a sign permit issued to the Socony Mobil Oil Company at 3825 W. Devon Avenue.

You further advise that the Department of Buildings has stated that this sign permit was issued in conjunction with an order of the Circuit Court and reviewed by the Corporation Counsel.

You ask our opinion as to whether or not the Court Order with reference to the filling station also required the Commissioner of Buildings to issue the sign permit for said filling station; whether the sign permit was properly issued; and whether the City of Chicago has the power to revoke the sign permit.

The judgment order in the above case concerned the establishment of the gasoline filling station at 3825 W. Devon Avenue was entered by Judge Fisher on January 16, 1957. At that time the subject property was zoned for business purposes and a gasoline filling station was a permitted use, provided there were the proper number of signatures for frontage consents. It pertained to frontage consents only.

The plaintiff, therefore, by virtue of the Court Order of January 16, 1957 had a right to establish and maintain the gasoline filling station on the property. Had he applied for a permit to construct the sign prior to the effective date of the new zoning ordinance of July 7, 1957, he clearly would have been entitled to his permit and the use of the sign on the premises. It is true that there was an intermediate ordinance zoning the property for residential purposes, but in our opinion this ordinance did not change the situation.

Independent of zoning, the last word in the Illinois Courts is that there is a property right to erect a sign for a business in which the complainant is engaged. In the case of *Illinois Life Insurance Co. v. City of Chicago*, 244 Ill. App. 185, the Court said on page 193:

"In our opinion the right to erect the sign was a part of the property right of the business in which the complainant was engaged. It was a right not derived from either the zoning law or the zoning ordinance * * *. It was a constitutional right wholly independent of either the zoning law or the zoning ordinance. Unless it can be said that the sign in question is *per se* as a nuisance, we think it would have been an unconstitutional exercise of power by the City to prevent its use in connection with the complainant's building."

However, in this case before us the company did not apply for a sign permit until December 6, 1957, approximately six months after the effective date of the new zoning ordinance and in the present ordinance there is a provision made for signs for business uses in residential districts, but not nearly as generous as the provision under the previous zoning regulations. Effective July 7, 1957, the owner of the filling station could obtain a sign in conformity with the regulations contained in Section 7.10-1, subsection (b) which provides as follows:

"For buildings other than dwellings, a single identification sign not exceeding 9 square feet in area and indicating only the name and address of the building and the name of the management thereof may be displayed, provided that on a corner lot two such signs—one facing each street—shall be permitted.

Projection. No sign shall project more than two inches beyond the property line into the public way.

Height. No sign shall project higher than one story or 20 feet above curb level—whichever is lower."

The permit was issued for the sign presently on the premises in error which can be readily understood in view of the Judgment Order for the gasoline filling station and a subsequent Judgment Order requiring us to issue permits for driveways. We could revoke the permit for the sign and seek to compel the owner to conform with provisions of the new ordinance.

However, in view of the fact that the sign was issued by a permit regularly obtained and has been established on the premises for nearly a year, it is our opinion that it is doubtful that we could prevail in court action.

BACK YARD PARKING FACILITIES

(No. 12279—Alderman, 5th Ward—E. W. P.—April 30, 1959.)

We have your letter of April 3, 1959, in which you advise that at a meeting of the East Hyde Park Area Council the question arose as to the legality of off-street parking practices. You advise that some apartment owners have removed their back fences which enclosed the back yards at the alleys and have opened the back yards to parking. In some cases you state that the parking is restricted to residents of buildings and to others it is rented to nearby residents.

You request an opinion as to whether this practice is lawful in an R District and what steps, if any, the owner must take as to the condition of the parking area.

The regulations with reference to off-street parking in residence districts are contained in sections 5.8-1 to 5.8-6 and also section 7.12 of the Chicago Zoning Ordinance. These provisions relate to the necessity of providing parking spaces and also with collective provisions for parking spaces, provided that all regulations governing location of accessory parking spaces in relation to the use served are adhered to. They further provide that no parking space or portion thereof shall serve as a required space for more than one use unless authorized by the Board of Appeals in accordance with section 11.7-4 (5) as a special use. The size of a required off-street parking space must be not less than 8 ft. in width and 19 ft. in length,

exclusive of access drives, etc., and each space must have a vehicle clearance of at least 7 ft. The section also provides that on an accessory parking space required for a dwelling, lodging house or a hotel, 25% may be rented out on a monthly basis to occupants of other buildings, lodging houses, or hotels.

We are of the opinion from an analysis of the Ordinance that it is legal for apartment owners to use their back yards for parking for use of their own tenants, provided the size provisions are complied with. It is also our opinion that the owner of an apartment building or a residence must obtain a special use through the Zoning Board of Appeals, subject to all of the regulations as to neatness, black topping, etc., as may be imposed by the Board, in the event that the owner of an apartment building or other residence wishes to rent out parking spaces.

RESTRICT CONSTRUCTION ON LOTS OF RECORD

(No. 12292—Alderman, 40th Ward—E. W. P.—July 29, 1959.)

We have your letters of July 8, 1959 and July 22, 1959, in which you request an opinion as to whether it would be legal for the City Council to enact an ordinance which would provide that in a district zoned for single family residences, the building of a home on a lot of record on the effective date of the ordinance, which was less than 3750 square feet in area was prohibited.

The Chicago Zoning Ordinance as amended on April 9, 1958 provides as follows:

“7.5 (2) In any residence district a one-family dwelling may be established on a lot of record on the effective date of this comprehensive ordinance regardless of the size of the lot; also if this lot is voluntarily increased in size and still does not comply with the minimum lot area of the district, a one-family dwelling shall be permitted, providing that all other requirements of this comprehensive amendment are met.”

Section 7.5-1 also relating to minimum lot area in a single family district provides as follows:

“In an R1 district, there shall be provided not less than 6,250 square feet of lot area per dwelling unit except that in cases where the predominant number of lots of record on the effective date of this comprehensive amendment fronting on the same side of the street between the two nearest intersecting streets, having a lot area less than that prescribed by the regulation of this district, then, and in that event, the lot area requirement shall be that of existing lot areas in the area previously described, but in no event shall the lot area requirement be less than 3,750 square feet.”

The ordinance, therefore, prohibits the building of a home on a lot which is not of record at the time of the passage of the comprehensive amendment of less than 3,750 square feet in an R1 district, but expressly authorizes the building of a home on a lot of record on the effective date regardless of the size of the lot.

A “lot of record” as defined in the ordinance is an area of land designated as a lot on a plat of subdivision recorded or registered, pursuant to

Statute, with the Recorder of Deeds of Cook County and the Ex-officio Examiner of Subdivisions of the City of Chicago. If it is established as a lot of record at the time of the passage of the ordinance the use of the property is an element of ownership therein.

"The principle that property may properly, by zoning, be utterly destroyed without compensation finds no support in the genius of our government nor in the principles of justice. If it be of public benefit that property remain open and unused, then certainly the public, and not private individuals, should bear the cost of reasonable compensation for such property under the rules of law governing the condemnation of private property for public use. It lies not within the power of a municipality to so zone property as to render it worthless. Such is not zoning. It is confiscation. *Tews v. Woolhiser*, 352 Ill. 221; *Forbes v. Hubbard*, 348 Ill. 166."

It is our opinion that the regulation you suggest in your letters would so permanently restrict the use of the lot of record that it could not be used for any reasonable purpose and would be arbitrary and unreasonable and would come within the constitutional inhibition.

STORAGE OF STEEL INGREDIENT

(No. 12329—Commissioner of Buildings—E. W. P.—April 18, 1960.)

There has been submitted to your department an application for a permit to install an outdoor storage yard by Acme Steel Company. This yard is to be used for the storage of raw materials to be used for Acme Steel Company in the making of new steel in its adjacent plant in Riverdale. The location of the proposed storage yard is at 401 W. 127th Street.

The plat plan shows that the yard will be serviced by railroads by the medium of tracks of the Pittsburgh, Cleveland, Cincinnati and St. Louis Railroad Company, which are already there and by future tracks to be laid down to fully service this future storage area. There will also be servicing by trucks. The proposed storage area is set back to the south of 127th Street.

The area for the proposed storage yard is embraced within an M3-3 District. The yard is a permitted use. However, you have raised the question as to whether or not the storage of some of the materials in this yard consisting of ferrous metals of steel and cast iron to be recovered from various other sources, including junk dealers would identify part of the premises as a junk yard. Should any part of the premises receive the category of a junk yard that would not be permitted and could only be located there after receiving authorization as a special use.

The specifications which accompany the application sets forth that all of these materials as stated above are purchased by the company from dealers in bulk for the use of Acme in the manufacture of certain of its products. Upon receipt by the company these ferrous metals will have been cut, sorted, baled and otherwise prepared in conformance with the company's specifications for use in its steel mill. The adequate description of this material, therefore, constitutes it as one of the ingredients in the making of steel by Acme.

The definition of a junk yard contained in Article 3 of the Ordinance provides:

"A 'junk yard' is an open area where waste or scrap materials are bought, sold, exchanged, stored, baled, packed, disassembled, or handled, including but not limited to scrap iron and other metals, paper, rags, rubber tires, and bottles. A 'junk yard' includes an auto wrecking yard, but does not include uses established entirely within enclosed buildings."

When these materials are processed by Acme for storage and later for use as a product or part thereof in their steel fabrication, according to the specifications all of the preparatory processes will have been done elsewhere.

When it reaches Acme to be integrated in its product, it has graduated from its former classification as junk and becomes an ingredient of Acme Steel. The terms in the definition "bought, stored or handled" in our opinion pertain to the operations of the junk dealer and not to an established steel company which purchases and stores the assembled product for its own use in the fabrication of steel.

It is, therefore, our opinion that the permits should issue, provided all other ordinances are complied with.

PRIVATE SWIMMING POOLS

(No. 12336—Chairman, Zoning Board of Appeals—E. W. P.—May 3, 1960.)

We have three letters from the Board of Appeals pertaining to four locations pending before you on appeal relative to swimming pools.

Your letter of March 31, 1960 pertains to the proposed construction of a swimming pool at the ground level of the rear portion of an existing four-story brick building containing sixteen apartments, located in an R7 zoned district. You advise that this swimming pool would be for the tenant of one apartment; that it would be fully enclosed and not visible to the outside and that access to the pool would be only through the apartment of the tenant in question who wishes to use it as a recreational facility for his family and his guests exclusively.

Your letter of April 18, 1960 advises that you have two other cases in which the Zoning Administrator has denied the right of the owner to erect or maintain a private outdoor swimming pool in a rear yard of his home in an R2 single family residence district.

The other case that you inquire about is the proposed installation of an outdoor swimming pool on the roof of a two-story garage of a twenty-story building to be erected at 545-59 W. Cornelia Avenue in an R7 general residence zone. Swimming pools are listed in the Index of the Chicago Zoning Ordinance, contained in the appendix therein as being permitted only in B4, B5, B7, C1, C2 and C3 districts.

In referring to the B4-1, B4-5 restricted service districts, we find that swimming pools are listed amongst amusement establishments with bowling alleys, dance halls, gymnasiums, swimming pools and skating rinks. These are business establishments within the district and cannot be qualified as private swimming pools. This use of business swimming pools is carried forward in the B5-1 through the B5-5 general service districts. The use is not permitted in the B6 district, known as the restricted central business

districts. However, it is again indicated as a business permitted use in the B7-5 through the B7-7 general central business districts. The use is then continued on a commercial use in all of the C1, C2 and C3 Districts.

Relative to swimming pools in residential districts there is no reference to them as permitted uses in any of the districts including R1 single family residence district through and including R8 general residence district. However, in all of the districts from R4 through R8 we have uses such as colleges and universities, private clubs or lodges and it is well known that swimming pools are usually part of the main use of these educational and club operations. They are not accessory uses but part of the principal use. University or college is not defined in our ordinance, but there are swimming courses and swimming meets in many universities and colleges and swimming pools are therefore part of their prime use.

A club or lodge is defined in the ordinance and the definition speaks of the affairs and management generally of such private club or lodge and the only prohibition of legitimate primary activities is with reference to the sale of alcoholic beverages. It is customary in many clubs and lodges to accommodate members and their families with swimming pools as a principal use. This is also true in many instances in hotels and motels which are classified as business establishments and swimming pools are permissible in the business districts in which motel and hotels are contained.

The swimming pool that you have under advisement as indicated in the first paragraph of this letter is located in an R7 zoned district and the building contains sixteen apartments, although the swimming pool is for the exclusive use of only one tenant in the apartment, and is contained wholly within his own private premises. The use that this applicant wishes contains such intimate element of privacy and protection from outside use that the use becomes part of his own living quarters and it is our opinion that in this particular instance where it is on the ground level of the building, fully enclosed and not visible to the outside with access only through his individual apartment, that it falls within the definition of a dwelling unit as contained in the ordinance. In these particular instances only where these conditions prevail, we do not consider it as an accessory use, but we believe it should be construed as a primary use.

This swimming pool does not fall within the purview of the definition of swimming pools in Section 61-18.1 of the Municipal Code, which is part of the ordinance passed concerning private residential swimming pools by the City Council on March 14, 1957. This definition provides as follows:

"The term 'private residential swimming pool' is hereby defined as a receptacle for water or an artificial pool of water having a depth at any point of more than two feet, intended for the purpose of immersion or partial immersion therein of human beings, and including all appurtenant equipment, constructed, installed, and maintained in or above the ground *outside of a building* used for a single family dwelling unit. Provided further, that such private residential swimming pool is maintained by an individual primarily for the sole use of his household and guests and not for the purpose of profit or in connection with any business operated for profit. *No out-of-doors* swimming pool intended for the use of members and their guests of a non-profit club or organization, or limited to house residents of a multiple dwelling unit, a block, subdivision, neighborhood, community or other specified area of residence shall be permitted in a single family residence duplex residence, or apartment district. (Passed. Coun. J. 3-14-57. p. 4427.)"

Relative to the appeal from a refusal by the Zoning Administrator to permit the installation of an outdoor swimming pool on the roof of a two-story garage of a twenty-story building to be erected at 545-59 W. Cornelia Avenue, zoned R7, general residence, this use is prohibited under the provi-

sions of Section 61-16. The R7 residence district is unquestionably an apartment house district, although under the new ordinance it is termed a general residence district and in addition to the limitations contained within the definition of a private residential swimming pool, we have Section 61-18.2, subsection (a) that private residential swimming pools shall be permitted in single family residence districts only. It is our opinion that the provisions of the Municipal Code must govern and in fact the Zoning Ordinance provides in Section 5.1 on interpretation as follows:

"Where the conditions imposed by any provision of this comprehensive amendment upon the use of land or buildings or upon the bulk of buildings are either more restrictive or less restrictive than comparable conditions imposed by any other provision of this comprehensive amendment or of any other law, ordinance, resolution, rule or regulation of any kind, the regulations which are more restrictive (or which impose higher standards or requirements) shall govern."

With reference to the two cases pending on appeal where the owners contend they have a right to erect or maintain a private outdoor swimming pool in the rear yard of their homes in an R2 single family residence district, we have carefully examined your letter and it is our opinion that the provisions contained in the Municipal Code with reference to swimming pools, grant the right to locate them and maintain them in accordance with all of the restrictions and other specifications contained in Sections 61-18 through 61-18.19, all inclusive.

We consider this right in single family residence districts as an accessory use indicated so by the provisions pertinent thereto of the Municipal Code. The Zoning Ordinance provides in Article 2, Section 17 that the provisions in the Ordinance are cumulative and additional limitations on all other laws and ordinances. Section 18.2 specifically permits private residential swimming pools in single family residence districts and the limitations imposed in the Code must be read in the Zoning Ordinance so as to govern the location and the maintenance of the swimming pool.

TEMPORARY USE OF LAND

(No. 12339—Alderman, 45th Ward—E. W. P.—May 13, 1960.)

We have your letter of April 28, 1960, addressed to Honorable John C. Melaniphy, Corporation Counsel of the City of Chicago, in which you inquire as follows:

"It is the desire of several service and community organizations to sponsor one or two day performances of the Adams and Sells Circus on vacant lots at various locations within the City of Chicago.

The Adams and Sells Circus has appeared in Chicago in the past under the sponsorship of various service or community organizations. This circus played in the 45th Ward last year and brought pleasure to the children of the community.

The circus and 'all cities, lot owners, parks, committees, associations and/or sponsors' are insured under a \$100,000/\$300,000 liability policy. No gambling or other games of chance will be conducted by the circus or permitted to be conducted by anyone else. None of the locations are within 200 feet of any church, hospital or building used exclusively for educational purposes.

The circus desires to obtain a public place of amusement license; application therefor is required to be checked to make certain that

use of the contemplated lots does not conflict with zoning. The zoning ordinance does not appear to deal with *temporary* outdoor public amusements such as contemplated here.

I will appreciate your opinion whether the temporary (i.e. one or two day) use of certain vacant properties for circus performances under the sponsorship of various service or community groups is a land use outside the contemplation of the zoning ordinance and not prohibited by it.

The dates of the performances, the sponsoring organizations and the locations of the contemplated sites are listed on the attached schedule.

Your help in making the presentation of this benefit circus a success will be greatly appreciated."

The scope of the regulations of the Chicago Zoning Ordinance as contained in Section 5.3 of the ordinances embraces:

"All building *erected* hereafter, all uses of land or buildings *established* hereafter, all structural alterations or relocation of *existing buildings* occurring hereafter shall be subject to all regulations of this comprehensive amendment which are applicable to the zoning districts in which such buildings, uses or land shall be located—" (Italics supplied)

This "circus" is included within the definition of a temporary carnival, which means, according to the statutory definition, "an aggregation of attractions, whether shows, acts, games, etc., which are temporarily set up or conducted in a public place or upon private premises accessible to the public * * *". The only reference to any carnival use is contained under special use, as a permanent carnival in the B4, B5, C1 and C3 districts. This would be an "established use" as contemplated in zoning, whereas the proposed attraction is merely a "temporary" arrangement.

In the case of *Peacock Point Corporation, et al. v. Maudon Land Improvement Corporation, et al.*, 33 N. Y. S. 2d 96, the Supreme Court of the State of New York had before it the question of a temporary use of property in a residential district for a period much longer than the time requested here of one or two operations of a circus. The permitted uses contained in the zoning ordinance were recited by the Court. The Court said:

"This ordinance in the judgment of the Court was intended to prohibit a permanent business, not an arrangement * * * for a relatively brief period only. Therefore the court finds that the defendant * * * is not engaged in business within the prohibition of the ordinance and that this is not a subterfuge on the part of the defendant to enable it to engage in the general and permanent business."

It is our opinion that in this particular instance only with all of the existing conditions present as set forth in your letter quoted above, that the performance to be held one or two days at each of the specified locations on vacant property where the Circus management has the authority to proceed from the owners of the land and is sponsored by those civic minded organizations within each community surrounding the proposed sites, are merely temporary arrangements and do not fall within the province of land use in zoning under our zoning ordinance. It is our opinion that provided all other ordinances are complied with that permits or licenses may issue irrespective of the zoning ordinance, for the limited time as prescribed.

PROJECTING SIGNS—LEGALITY OF ZONING PROPOSALS

*(No. 12346—Chairman, Committee on Building and Zoning—E. W. P.
—June 23, 1960.)*

We have your letter of June 20, 1960, in which you request an opinion as to the legality of each of two proposed ordinances for amendment of the Chicago Zoning Ordinance concerning projecting overhanging signs, located in the present limits of the B6 restricted central business district.

The subject signs project more than 12 inches across the property line into the public way and are nonconforming signs. Section 8.9-6 pertaining to the B6 District of the Zoning Ordinance provides in subsection (2) :

“Projection. * * *, no sign shall project more than 12 inches across the property line into the public way.”

The first proposed amendment which is before your Committee contains a proposed addition to Section 6.4-8, which pertains to the elimination of nonconforming buildings and structures to be known as a new paragraph (6a). It provides that any such nonconforming sign which advertises the business or the merchandise sold by the owner or occupants of the premises in a B6 district shall be immediately removed if there is a change in the name, occupancy, type of business carried on or merchandise sold. It further provides that such nonconforming sign in the B6 district, which has been altered or remodeled since July 7, 1957, the effective date of the ordinance, due to the change in the name, the occupancy, the type of business carried on or the merchandise sold, shall be removed prior to January 1, 1966.

There are additional provisions prohibiting the issuance of permits to alter, repair or renovate the nonconforming sign so as to extend the life of the nonconforming sign beyond January 1, 1966, and that in the event a nonconforming sign is found to need repairs or renovation due to the inspections made mandatory by Chapter 86.1 of the Code that such signs shall be immediately ordered removed by the Commissioner of Buildings as provided for in said chapter.

It is our opinion, after a careful consideration of the basic principles specified in the Zoning Ordinance which underlie the foundation for the various sections pertaining to nonconforming buildings and structures and uses, that this proposed amendment is inconsistent and contrary thereof. We do not believe that it is necessary to analyze all of these basic principles and the point we wish to emphasize is that the proposed amendment does not fall within the pattern now well established in the ordinance for the elimination of nonconforming structures and uses, including the amortization schedules which are all on a time basis, and have been found legal and constitutional by the courts in other states.

Furthermore, this proposed amendment, in our opinion, could not be upheld in the courts because it discriminates against competitors in the same line of business, immediately interferes with the freedom of sales of a going business, and would seriously retard or curtail the substitution of one use for another legal use. A should not be penalized by depriving him of a nonconforming use of the projecting sign, while B continues freely and without any amortization provided for his nonconforming use of a similar project. Nor should A be penalized because he has legally altered or remodeled his nonconforming sign retroactively from the date of the proposed amendment but subsequent to the effective date of the ordinance of July 7, 1957, when his competitor or neighbor B may continue indefinitely without amortization be-

cause he had made no alterations or remodeling. No one has any inherent right to use the streets for business purposes but an ordinance must apply equally and uniformly to all persons similarly situated and the classification must be reasonable and proper. *City of Decatur v. Chasteen*, 19 Ill. 2d. 204.

Relative to the substitute proposed amendment before your committee, we are of the opinion that the provisions contained therein are constitutional. These provisions conform with the standards of elimination of nonconforming structures and uses as set forth in Article 6 of the Zoning Ordinance. They apply equally and uniformly to all persons similarly situated, and in our opinion the classification is reasonable and proper.

No one has a constitutionally protected right of property in connection with the use of the public way for business purposes. *City of Decatur v. Chasteen*, 19 Ill. 2d 204. The power to regulate and prohibit on the part of the municipality is beyond question, and the power to exclude includes the power to eliminate the use where no merely arbitrary discriminations are made. *Weksler v. Collins*, 317 Ill. 132.

The proposed amendment of Article 3, in the definition of a "sign" as a structure or a part thereof, including any billboard, strengthens the ordinance, and consistently places the sign within the purview of Article 6 pertaining to the elimination by amortization of structures. The proposed amendment (6A) for the removal of all signs located in a B6 district which project over the public way more than 12 inches within 10 years from the effective date of the amendment, affords ample opportunity for all similarly situated to comply with the regulations of the district on an equal basis. The public is also assured by this proposed amendment that the district in which the nonconformity exists will eventually benefit from the uniformity of permitted uses, and within a maximum time of 10 years.

The proposed amendment (6B) which provides that any billboard or advertising sign located on unimproved property shall be removed within five years from the effective date of the amendment in our opinion is constitutional. The Enabling Act in the Statute provides that the power to eliminate shall not be exercised so as to deprive the owner of any existing property of its use and maintenance for the purpose to which it is then lawfully devoted, but that provisions may be made for the gradual elimination of structures which are incompatible with the character of the district. In these instances, where the nonconforming billboard or advertising signs are located on unimproved property in a B6 district, it is our opinion that the municipality could eliminate them by ordinance when the existing rights of the persons in possession thereof are terminated, or in the event that the assessed valuation of the structure was under \$2,000 as of July 7, 1957. This amendment therefore is reasonable and cannot be construed as arbitrary or capricious. These signs on unimproved land, because of the non-use of the land for other purposes, in our opinion have an unfair effect on the taxable value of other property in the district, and are adverse to the development of the Central District of Chicago, and a five-year amortization period from the effective date of this ordinance is clearly warranted.

FREIGHT YARD RELOCATION AGREEMENT

(No. 12352—Chief Engineer, Dept. of Public Works—E. W. P.—
August 17, 1960.)

This letter is in answer to your letters of January 26, 1960 and August 5, 1960, summary of the documents and papers you have submitted, and our several telephone conversations.

On March 23, 1960, the City Council of the City of Chicago took the following action as appears in the Council Journal at page 2197 of that date:

"Execution of Agreement Authorized with State of Illinois and C. R. I. & P. R.R. Co. for Conveyance and Exchange of Property Needed for South Route of Comprehensive Superhighway System.

The Committee on Finance submitted a report recommending that the City Council pass the following proposed ordinance transmitted therewith:

Be It Ordained by the City Council of the City of Chicago:

Section 1. That the Mayor, the City Comptroller and the City Clerk be and they are hereby authorized and directed to execute for and on behalf of the City of Chicago, an agreement with the State of Illinois and the Chicago, Rock Island and Pacific Railroad Company whereby the State will purchase certain parcels of real estate between W. 53rd St. and W. 51st St. and between S. LaSalle St. and S. Wentworth Ave. which will then be conveyed to the Railroad Company in exchange for property now owned by the Railroad Company between W. Root St. and W. 44th St. which lies within the right of way of the South Route Expressway and is necessary to the construction thereof, the City agreeing to later vacate an alley and S. LaSalle St. within and adjacent to the property first referred to above, said agreement to be in substantially the form attached hereto and made a part of this ordinance.

Section 2. The City Comptroller is hereby directed to accept the delivery of said agreement when executed and to file the same for record.

Section 3. This ordinance shall be in force and effect from and after its passage."

Pursuant to the ordinance quoted, authorization of the State and authority of the Railroad, the City, State and Chicago, Rock Island & Pacific Railroad Company entered into an agreement under date of April 18, 1960, whereby the State will purchase the real estate located between W. 53rd Street and W. 51st Street and between S. LaSalle Street and S. Wentworth Avenue, Chicago, Illinois, along the right of way of the railroad, said property to be conveyed to the Railroad for its use as a freight yard and other railroad facilities in exchange for property now owned and used by the Railroad as a freight yard, tracks and other railroad facilities, located between W. 44th Street and W. Root Street, on or adjacent to the railroad right of way between Wentworth and Federal St., Chicago, Illinois. This later property, after the railroad facilities are relocated, will be then utilized as part of the South Route of the Comprehensive Superhighway System, known as the South Expressway, to provide relief to existing traffic conditions in the south portion of the Chicago Metropolitan area, to promote the safety and acceleration of highway traffic movements in and through said area.

Petition was filed by all parties to the agreement of April 18, 1960 before the Illinois Commerce Commission of the State of Illinois, on July 15, 1960 for permission to relocate the trackage of the Railroad to the site as designated in the first paragraph of this letter, and for approval of the agreement between the parties, and order was entered by the Commission on July 27, 1960, approving the agreement and relocation of the yards of the railroad adjacent to its right of way between West 51st Street and West 53rd Street, and between South LaSalle Street and South Wentworth Avenue, Chicago, Illinois, the area specified in the agreement of April 18, 1960, and also in the ordinance approving the relocation and execution of the said agreement, passed by the City Council on March 23, 1960.

Your first letter of January 26, 1960 was written during the negotiations prior to the ordinance, agreement of the parties and the order of the Illinois Commerce Commission. You directed our attention in that letter to the M1-2 zoning of the relocation property and noted the requirement of the zoning ordinance for a special use to establish railroad switching and classification yards, repair shops and roundhouses in an M1 District through the Board of Appeals. We could take no action in that direction, especially at that time, because of lack of title (all of the property for relocation was owned and occupied by mixed uses, mostly homes), and because of patent impracticability.

Subsequent events, i.e., the approval of the City Council of the City of Chicago, the agreement entered on and in behalf of the City, and the order of the Illinois Commerce Commission, and the direct participation of the State of Illinois have, in our opinion, established the use of the proposed relocation property, for the yards and kindred facilities for the Railroad upon its acquisition by the State and conveyance to the Railroad for the proposed railroad purposes, specified by the City, State and Railroad. One of the objectives of zoning as named in the Enabling Act, Sec. 73-1 is to lessen and avoid congestion in the public streets, another is for the general welfare. It is true that the Statute in Sec. 73-4 specifies that the regulations authorized may be varied in their application only by the Board of Appeals subject to the power of the corporate authorities to prohibit in whole or in part. However, in a recent Supreme Court case, *Kotrick et al. v. The County of DuPage*, 19 Ill. 2nd, 181, the Court distinguishes a special use from a variation. It said that the two techniques are not identical, that the scope of a special use differs from that of the variation. The latter is designed to handle cases of practical difficulty or particular hardship to property owners, the former is permissible as a means of implementing the powers of the corporate authorities conferred by Statute. One of the categories of the special uses in 11.10-1 embraces uses either municipally operated, or operated by publicly regulated utilities or uses traditionally affected with a public interest.

It is our opinion that there are very rare instances when the City Council by its action may directly or indirectly pass an ordinance which would obviate the necessity of procedure through the Zoning Board of Appeals when the requirement for such processing is indicated in the Ordinance. They should be limited to those few instances where as in this case, progress *must* be made expeditiously for the implementation of the South Route Expressway. This is a governmental function of the first magnitude and to attain it, we must relocate the yards of the Railroad along its own right of way at the proposed location. Furthermore, we are faced with legal barriers in processing an application through the Board of Appeals, and further may deter the State in its acquisition of the land. Our investigation through the City Planning Commission develops that the subject land for relocation as well as adjacent property is scheduled for manufacturing uses throughout, although now improved with mixed uses mostly residential. It is our opinion that the ordinance approving the agreement imposes higher standards for the general welfare, and the provisions as to relocation in the agreement govern in accordance with Sec. 5-1 (2) of the Zoning Ordinance.

It is further our opinion that in this instance, we may assure the State and the Railroad that any permits or certificates of occupancy for the proposed use will be granted by the City of Chicago, and that we will not interfere with their location or occupancy, but will regard their use as a permitted use on their relocation, subject to the regulation for a permitted use.

REAR YARD REQUIREMENTS—MOTELS

(No. 12359—Zoning Administrator—E. W. P.—November 18, 1960.)

Reference is made in this letter to the provisions of Section 8.7-4, Residential Rear Yards and the corresponding Section 8.7-1, which reads as follows:

"For residential uses located above the first floor there shall be provided a rear yard. Such yard shall be not less than 30 feet in depth and shall begin at a level no higher than the level of the finished floor of the lowest residential unit."

The Zoning Board of Appeals of the City of Chicago has requested an opinion as to the application of this section as it pertains to motels which are permitted uses under item (19), which indicates hotels and motels commencing in a B4 district of the Chicago Zoning Ordinance.

There are business establishments under Section 8.3-4, item 2, and a motel is defined in the ordinance as an establishment consisting of a group of attached living or sleeping accommodations with bathroom and closet space located on a single zoning lot and designed for use by transient automobile tourists. They further differ from strict residential classification inasmuch as a motel again, according to the definition, furnishes customary hotel services, such as maid service and laundering of linen, telephone and secretarial or desk service. Furthermore, parking spaces generally within the "L" shape of the front of the motel must be provided for each dwelling unit or lodging room, plus a parking space for the owner or manager and it would be uneconomical to require a 30-foot rear yard in these instances.

Motels were formerly permitted uses in some residential districts, but the ordinance has now been amended so that they may be considered as business establishments allowed only in certain business and commercial districts.

It is our opinion that the requirements for residential uses, located above the first floor, in Section 8.7-1, for rear yards, has no application to hotel and motel establishments, and that permits may be issued irrespective of the provision of this particular section.

However, this does not eliminate the need for transitional yards where the side and rear lot line coincides with a side lot line or rear lot line of a residential district, etc., as specified in Section 8.8-1, sub items 1, 2, 3 and 4 of the ordinance. These transitional yard requirements apply to all uses in the B districts, excepting only in the B6-6, B6-7, B7-6 and B7-7 districts.

VARIATION—VESTED RIGHT IN

(No. 12360—Commissioner of Buildings—E. W. P.—November 29, 1960.)

We have your letter of November 4, 1960, in which you request an opinion relative to an application for a permit to erect a fifteen story brick apartment building and penthouse, and which plans are accompanied by a copy of a variation granted by the Board of Appeals on May 6, 1958, Calendar No. 183-58-Z and a copy of an order granted by the Board of Appeals on December 9, 1958, in which an extension of time to obtain the per-

mit was granted until July 1, 1959, Your letter requests our opinion as to whether or not a permit should issue to the 5401 Hyde Park Building Trust, who was the applicant who received the variation from the Board of Appeals for the premises located at 5401 Hyde Park Boulevard.

On May 6, 1958, the Board of Appeals granted the following variation:

"RESOLVED, that the Board of Appeals by virtue of the authority conferred upon it does hereby make a variation in the application of the district regulations of the zoning ordinance and that a variation be and it hereby is granted to permit the erection of a 15-story brick apartment building and penthouse whose front and rear yards and floor area ratio will not comply with the requirements of the zoning ordinance, on premises at 5401 Hyde Park Boulevard, on condition that all other ordinances of the City of Chicago shall be complied with and that plans in triplicate shall be identified as the plans approved by the Board of Appeals before a permit is issued and the Commissioner of Buildings is hereby ordered to issue a permit herein in conformity with the provisions of this resolution."

We are advised by the applicant that, upon receiving the variation from the Board of Appeals, they prepared plans at a cost of \$20,000.00 by the architect firm of Vytas Pelda & Associates. These plans were identified and approved by the Board of Appeals. The plans were then forwarded to Dovenmuehle, Inc. the mortgage brokers who were paid the sum of \$4,989.05 for mortgage financing and an additional sum of \$2,092.85 for F. H. A. filing fees. After receiving approval from the F. H. A. for financing the plans were then transmitted to the Hyde Park Kenwood Community Conservation Council for approval, which was subsequently given. In the interim the applicant hired Telander Bros. Contractors to make soil boring tests and to determine the depth upon which the foundation may be safely built in order to comply with the building ordinances for which they were paid the sum of \$9,000.00.

The issuance of the permit has been withheld pursuant to Article 11.7 which requires a building permit to be obtained within six months from the date of granting a variation. The applicant is therefore faced with the probability that the commitment issued to it by the F. H. A. will be revoked in the event the permit is not issued.

Article 11.7 of the Zoning Act provides as follows:

"The concurring vote of four members of the Board of Appeals shall be necessary to grant a variation. No order of the Board of Appeals granting a variation shall be valid for a period longer than six months from the date of such order unless a building permit is obtained within such period and the erection or alteration of a building is started or the use is commenced within such period."

"The rule of law in this State is that where there has been a substantial change of position, expenditures, or incurrence of obligations made in good faith by an innocent party under a building permit or in reliance upon the probability of its issuance such party has a vested property right and he may complete the utilization of the premises for the purpose originally authorized irrespective of subsequent zoning or a change in zoning classification. *People ex rel. Skokie Town House Builders, Inc. v. Village of Morton Grove*, 16 Ill. 2d 183, citing *Fifteen Fifty North State Building Corp. v. Chicago*, 15 Ill. 2d 408 and *Deer Park Civic Ass'n v. City of Chicago*, 347 Ill. App. 346 (petition for leave to appeal denied 412 Ill. 629). Also see *Ward v. Village of Elmwood Park*, 8 Ill. App. 2d 37."

The Board of Appeals had already passed upon the application and had favorably approved the plans, and in view of the above circumstances it would require the applicant to duplicate the work that it had already performed and to proceed further on a moot question.

It is our opinion in light of the established vested rights due to the expenditures and incurrence of obligations made in good faith by the applicant herein, and also since the applicant did diligently commence its work as soon as the variation was granted, it comes within the provision of the Article 11.7 of the Zoning Ordinance that the use was commenced within such six month period and therefore a permit should issue.

HOMES—CLASSIFIED SPECIAL USES

(No. 12362—Chairman, Committee on Buildings and Zoning—E. W. P.
—December 20, 1960.)

You have before you a proposed Amendment to the Chicago Zoning Ordinance to eliminate Convalescent Homes, Rest Homes, and Nursing Homes from the categories of permitted uses in the R-4 through the R-8 General Residence Districts, and to add these uses within the categories of Special Uses as Convalescent Homes, Rest Homes, and Nursing Homes. You have requested our opinion as to the legality of this procedure.

The General Residence Districts now include within the permitted uses, aside from those designated in the first paragraph of this letter, Hospitals, Sanitariums, Eleemosynary Uses or Institutions, Lodging Houses and Tourist Homes, Nursery Schools, Boarding; Private Clubs or Lodges—not operated for profit; Elementary and High Schools, Boarding; Fraternity and Sorority Houses; Colleges and Universities—not including business or trade schools; Foreign Consulates. These uses, of course, are in addition to home residence and apartment house uses. We mention them because some of the incidents and characteristics of Convalescent Homes, Rest Homes, and Nursing Homes are contained within Hospitals, Sanitariums, Institutions for the Aged, and Lodging Houses.

With reference to Special Uses in the General Residence Districts there is contained the use of institutions for the Care of the Insane or Feeble-minded. We mention this because, in our opinion, this use can be clearly distinguished from the uses herein designated as the present permitted uses for the aged and senior citizens.

The leading and in fact the only case in Illinois which discusses the application of a Special Use is contained in the case of *Kotrich et al. v. The County of Du Page, et al.*, Justice Schaefer wrote the opinion in that case and we quote the Court, on p. 183:

"The special use is a relatively new method of land use control. Zoning ordinances embodying this technique retain the usual residential, commercial, and industrial zones, specifying the uses permitted in each zone. For each zone, however, special uses are also established which are permitted within the zone only if approved by the zoning board * * * In Du Page County, the ordinance specifies private outdoor recreational facilities among the special uses which may be permitted in the R-2 single family residence zone—Colleges and universities, public outdoor recreational centers, *rest homes*, hospitals and sanitariums, planned developments * * * and 'public service uses' such as electric and telephone exchanges, filtration plants, and fire and police stations * * *.

"Instead of excluding such uses entirely from certain zones because of the harm they might cause, or, despite the potential harm, including them because of the benefits they will bring, the special use technique allows a more flexible approach. It contemplates that the * * * board may permit these uses when desirable and, if necessary, impose conditions designed to protect nearby property owners. This seems to be an effective method of dealing with a narrow but difficult

problem of land use control. Approximately 25 municipalities and counties in Illinois have incorporated it in their zoning ordinances, and the record shows that its use is increasing * * * *unlimited application of the special use technique to land uses that can readily be accommodated within the customary categories would undermine the protection contemplated by the Statute—only those infrequent uses which are beneficial, but potentially inconsistent with normal uses in the various zones, need be included.*" (Italics supplied.)

The Court indicated that a fair reading of the ordinance should contemplate that the board will weigh the desirability of the proposed use against its potential adverse impact. The Court had under consideration only one of the Special Uses enumerated, that of a private club organized as a not-for-profit corporation for social, educational and athletic purposes and the expert evidence in that case was to the effect that special uses generally occupy a rather large tract of land and cannot be categorized in any given use zone without the danger of excluding beneficial uses or including dangerous ones. The Court in that case sustained the validity of the special use ordinance, as such, and the special use permit for the club.

Chief Justice House, in a dissenting opinion, made a very learned comment which, while it might be contrary to the determination of the majority opinion, is generally true. He said:

"The ingenuity of members of our profession could conceivably conjure up so many 'unique' situations which would require applications of special use procedures that *ad hoc* determination could become the rule rather than the exception."

With reference to Convalescent Homes, Rest Homes, and Nursing Homes for many years the consent of the owners of the majority of the frontage in the same block and a majority of the frontage on the opposite side of the street in writing was required before one could operate or conduct this use. The Supreme Court sustained the judgment of the Trial Court which declared the Frontage Consent Ordinance void, and, in so doing, said, on p. 275 (*Valkanet v. Chicago*, 13 Ill. 2d 268).

"In the case at bar there is neither legislative finding that the proposed use is a public nuisance, or that it is apt to be such when operated in an apartment-house-use district, nor satisfactory evidence tending to show that the maintenance of the home will work an injury, annoyance or inconvenience to any property owner. On the contrary, the general zoning plan of the city of Chicago declares a nursing home to be appropriate in an apartment-house-use district. The record fails to disclose a rational basis for subjecting homes for the aged to the requirement of frontage consents and is without evidence to support a conclusion that the proposed use has any different effect on the public health, welfare, safety and morals than the other permitted uses in the district.

"Since we find no basis for the exercise of the police power in prohibiting the home for the aged in the apartment-house-use district, the ordinance as applied to this proposed use is an unconstitutional deprivation of property without due process of law."

The ordinance under advisement, in our opinion, would not be reasonable or constitutional; first, because, as stated in the *Valkanet* case, there is no basis for the exercise of police power in prohibiting the home for the aged in the apartment-house-use district, and the ordinance would be an unconstitutional deprivation of property without due process of law, and; second, to place the Convalescent Home, Rest Home, and Nursing Home in the category of Special Uses and to permit Hospitals, Sanitariums, Institutions for the Aged, Lodging Houses and Tourist Homes, and private Clubs and Lodges not-for-profit (which could well be Clubs or Lodges of senior citizens) in a permitted use in the same district would be discriminatory and also an unconstitutional deprivation of property without due process of law.

C. FRONTAGE CONSENTS

FACT TO WITHHOLD CONSENTS

(No. 11814—Commissioner, Department of Buildings—A. F. G.—May 14, 1954.)

On April 22, 1954 we received a letter from Roy T. Christiansen, Commissioner of Buildings, to which was attached a frontage consent petition for a filling station at 2918-24 E. 87th street and 8646-56 S. Exchange avenue, and for an auto repair shop at the same location, which were checked by the Map Department and approved with a surplus.

There was also attached a protest petition, requesting that action on the permit be withheld until the matter could be clarified. The second paragraph of the letter of protest reads as follows:

"I would like to bring to your attention the fact that several of the signatures on the application you now have in your department also appear on a petition that was signed and recorded on March 28th, 1940 in which these same property owners irrevocably agreed that a gas station on these same premises would never get their consent. In the opinion of our attorney this invalidates several of the signatures that you presently have on the petition that you have for approval."

The Commissioner requested our opinion as to what action he should take in this matter.

The attached frontage consent petition is in the form prescribed by ordinance, it is signed by a majority of the property owners whose signatures are required; the person securing the signatures certifies under oath that he saw the persons sign the petition and that each one stated at the time that he was the owner of record of the property described opposite his name; and the superintendent of maps has certified that there is a surplus over the ordinance requirement.

If no signatures are withdrawn which would reduce the petition below the required maximum, we are of the opinion you should issue the permits.

We do not believe the private agreement entered into 14 years ago among certain property owners to withhold consent has any binding effect upon your right to issue permits where the ordinance requirements have been complied with. If any of the parties to the agreement is aggrieved by breach of the agreement his remedy is against the one causing the breach.

PROTEST PETITION

(No. 11832—Commissioner of Buildings—A. F. G.—June 28, 1954.)

On June 18, 1954, you sent to this office a file which you requested us to review and advise you as to the action which should be taken with reference to invoking Section 40-4 of the Code in the case of the filling station at 3006-24 W. Peterson avenue and 6105-11 N. Whipple street. The file contained Frontage Consent petition for the said filling station to which was

attached the report of the superintendent of maps certifying the sufficiency of the petition. Two letters from Attorney Stephen Love also were attached. It also contained a protest petition signed by 20 owners of property in the square block bounded by, on the south by Peterson avenue, on the west by N. Whipple street, on the east by N. Sacramento avenue and on the north by Hood avenue. All of the property listed on the protest petition is located on the east side of N. Whipple street between Hood avenue and the east and west alley south of Hood avenue. None of the property listed is in the "square" for which application for a building permit has been made. The petition was filed under Section 40-4 of the Municipal Code of Chicago, but the signers and their attorney seem to have misconstrued the language used in defining the term "square" for the purposes of that section.

Section 40-4 reads as follows:

"In all cases where an application for a permit for the construction of a new building in any square in which a majority of the buildings are used exclusively for residence purposes, or in a square on the opposite side of the street from such square so used for residential purposes, if there shall be filed with the commissioner of buildings a protest signed by not less than ten owners of property in such square so used for residential purposes, or in case the ownership of the frontage is in less than twenty persons then if signed by a majority of the owners according to frontage, the commissioner of buildings shall withhold the issuance of the permit until the city council shall have ordered a public hearing similar to that required in an act of the general assembly entitled 'An Act to confer certain additional powers upon city councils in cities and presidents and boards of trustees in villages and unincorporated towns concerning buildings and structures, the intensity of use of lot areas, the classification of trades, industries and structures with respect to location and regulations, the creation of districts of different classes, and the establishment of regulations and restrictions applicable thereto,' in force June 28, 1921, as amended. For the purpose of this section a square shall be understood to be a plot of ground containing city lots surrounded by public ways, railway rights of way, natural boundaries, or public places."

The term "public way" is defined twice in the Code, once in Section 1-9 and again in Section 47-2.

Section 1-9 (f) reads: "Public way—any sidewalk, street, alley, highway, or other public thoroughfare;"

Section 47-2 reads: "Public way. A public street, alley, sidewalk or park."

In both definitions a public alley is defined as a "public way".

The "square" as that term is defined in Section 40-4 in which the application for a building permit has been made is bounded on the west by N. Whipple street, on the east by N. Sacramento avenue, on the south by W. Peterson avenue, and on the north by the public alley north of and parallel to W. Peterson avenue.

As none of the property listed in the protest petition is in the square for which a permit has been requested, the petition is ineffectual to require the commissioner of buildings to withhold the issuance of the permit until the council has ordered a public hearing.

The block in question is entirely vacant and is zoned for Business, in which a Filling Station is a permitted use. If you are satisfied with the sufficiency of the Frontage Consent petition, it is our opinion you should issue the requested permit.

FRONTAGE CONSENTS FOR NURSING HOMES

(No. 11963—President, Board of Health—E. W. P.—October 6, 1955.)

We have your letter of August 22, 1955, requesting an opinion as to whether or not frontage consents are necessary for the location and operation of a nursing home at 615 W. Waveland Avenue, Chicago, Illinois. You state that the building is a coach house located on the rear of the lot occupied by the Waveland Manor Nursing Home at 3662 Lake Shore Drive, and that it is understood, in accordance with plans submitted to the Building Department for a permit, this building will be connected with the improvement at 3662 Lake Shore Drive by some sort of passageway.

The Map Department of the City of Chicago shows that the proposed location bears the street address of 615 W. Waveland Avenue and that the block on both sides of the street between Lake Shore Drive and Pine Grove contains apartment houses and a residence. There are no other uses in the block. Section 136-6 of the Municipal Code provides as follows:

"No city license shall be issued to any person to operate or conduct a home in any block in which two-thirds of the buildings fronting on both sides of the street on or along which the proposed home may face are devoted exclusively to residence purposes, unless the owners of a majority of the frontage in such block and the owners of a majority of the frontage on the opposite side of the street on or along which said building faces, consent in writing to the operation or conducting of any such home in such block; provided, however, that no new frontage consents shall be required if such home has heretofore been licensed by the city as a hospital, home, or nursery at the present location.

Such written consents of the majority of said property owners shall be filed with the board of health before a license shall be issued for the operation or conducting of any such home."

Over two-thirds of the buildings fronting on both sides of the street in this block are devoted exclusively to residence purposes and frontage consents are required for the operation or conduct of a nursing home in this block. The fact that a nursing home is legally established at 3662 Lake Shore Drive in our opinion does not in any way afford the licensee of that home to operate or conduct a nursing home at 615 W. Waveland Avenue, whether it is separated or physically connected with the nursing home at 3662 Lake Shore Drive, unless and until the requisite frontage consents are obtained in the Waveland Avenue block, and filed with the Board of Health.

BOUNDARY PROPERTY CONSENTS

(No. 12013—Commissioner of Public Works—J. P. M.—February 21, 1956.)

This will acknowledge your letter and diagram of February 9, 1956 regarding the application of Chapter 127-5, Municipal Code of Chicago, to property which is located on the boundary line of the corporate limits of the city of Chicago. In your letter you request an opinion regarding two suggested plans of checking frontage consents petitions in such cases.

Chapter 127-5 of the Municipal Code of Chicago provides in substance that prior to the use of premises for the erection and operation of a gasoline

filling station, the majority of frontage owners within 150 feet from the outer lines of each side of the proposed site must give their consents.

In your first method you suggest that the total frontage within the 150 foot line outside the city limits be subtracted from the majority of the frontage within the 150 foot lines within the city.

Webster's Second International Dictionary defines majority as: "more than $\frac{1}{2}$ of any total".

Inasmuch as the total frontage outside the city limits will in most instances be more than the majority of frontage within the city, such a method would be unrealistic, and authority for such method can be found nowhere in the Municipal Code of Chicago.

In your second method you suggest that a 300 foot line be used on the side of the site within the city where the 150 foot line on the opposite side would be outside of the city limits.

The Municipal Code of Chicago applies only within the territorial limits of the city of Chicago and chapter 127-5 of that code specifically provides that consents will be obtained from a majority of frontage owners within 150 feet of the outer lines on each side of the proposed site.

It is therefore our opinion that neither of the two proposed methods of checking frontage consent petitions of gasoline filling station sites which lie on the boundaries of the corporate limits of the city of Chicago are authorized by the Municipal Code of Chicago.

DRIVE-IN RESTAURANTS—FRONTAGE CONSENT PROPOSAL

*(No. 12040—Committee on Judiciary and State Legislation—A. F. G.
—May 24, 1956.)*

In your letter of April 24, 1956 you request that we advise you as to the power of the city council to require frontage consents as a condition prior to the issuance of permits for the establishment of so-called drive-in restaurants where food, refreshments and soft drinks are sold and served on the premises or in automobiles parked on the premises.

The City is given express power by section 23-54 of the Revised Cities and Villages Act "to license, tax and regulate all places for eating or amusement".

Pursuant to this power the city council has enacted sections 130-15 to 130-32.1, inclusive, under the heading "Food Dispenser".

These sections provide comprehensive and strict requirements to insure sanitary and healthful conditions in restaurants. They provide regulations for the manner of cleaning dishes, the care of certain foods, the habits of employees, the light and ventilation of the kitchen and other rooms in the restaurant, and the licensing and semi-annual inspection of the premises.

None of the foregoing provisions attempts to fix the location of restaurants. The Chicago Zoning Ordinance provides in which districts restaurants are a permitted use. In the enactment of the said zoning ordinance the council evidently did not consider restaurants detrimental to the comfort and well being of persons who are required to reside near them, as it permits a restaurant in a hotel if the entrance to the restaurant is from the lobby of the hotel. A hotel is a permitted use in an Apartment House district. Restaurants are also permitted in Specialty Shop districts if no entertainment is provided. A Specialty Shop district is essentially an Apart-

ment House District in which certain inoffensive retail shops are permitted on the first floor of a building.

Frontage consent ordinances are generally sustained when applicable to occupations the municipality has been granted power to prohibit. If power to prohibit has been granted, a business or occupation may be prohibited by ordinance in certain areas unless a majority of the property owners in the area consent to its establishment. But if power to prohibit has not been granted, an ordinance which makes its location subject to the consent of property owners, would most likely be held to be an unconstitutional delegation of legislative power to private parties.

Even if a municipality is vested with all of the police power of the State, it would not have power to deprive a citizen of valuable property rights under the guise of prohibiting or regulating some business or occupation that has no tendency whatever to injure the public health or public morals or interfere with the general welfare (*The People v. City of Chicago*, 261 Ill. 16, 1913).

The municipal code does not define a "drive-in restaurant", nor is it defined by Webster. We are not familiar with the operation of a so-called drive-in restaurant. If it is merely an ordinary restaurant, meeting the rigid requirements of Chapter 130, but for which the proprietor provides off-street parking facilities on the premises and permits patrons to drive their automobiles into the premises, we do not believe an ordinance requiring frontage consents for its establishment would be valid.

Your letter does not indicate under what circumstances frontage consents would be required. It certainly would appear unreasonable to require frontage consents to locate a drive-in restaurant in a commercial, manufacturing or industrial district. It is almost universally held that an act of the Legislature which deprives the citizen of his liberty or property rights cannot be sustained unless the public health, comfort, safety or welfare demands such enactment (*Ruhrstrat v. People*, 185 Ill. 133; *Bailey v. People*, 190 Ill. 28; *Bessette v. People*, 193 Ill. 334).

We do not believe the proposed ordinance would be sustained by the courts.

NURSING HOME

(No. 12287—President, Board of Health—M. C. H.—June 15, 1959.)

We have your letter to this office in which inquiry is made whether or not it is necessary to have frontage consents from a majority of the property owners in the block to be filed with the Board of Health before a license shall be issued to construct a nursing home under Chapter 136 of the Municipal Code of Chicago.

Chapter 136-6 of the Municipal Code of Chicago, reads as follows:

"No city license shall be issued to any person to operate or conduct such a home in any block in which two-thirds of the buildings fronting on both sides of the street on or along which the proposed home may face are devoted exclusively to residence purposes, unless the owners of a majority of the frontage in such block and the owners of a majority of the frontage on the opposite side of the street on or along which said building faces, consent in writing to the operation or conducting of such home in such block * * *."

The court in the case of *Valkanet v. City of Chicago*, 13 Ill. 2nd p. 268, declaring Section 136-6 of the Municipal Code of Chicago unconstitutional, held as follows:

"In the case at bar there is neither legislative finding that the proposed use is a public nuisance, or that it is apt to be such when operated in an apartment-house-use district, nor satisfactory evidence tending to show that the maintenance of the home will work an injury, annoyance or inconvenience to any property owner. On the contrary, the general zoning plan of the city of Chicago declares a nursing home to be appropriate in an apartment-house-use district. The record fails to disclose a rational basis for subjecting homes for the aged to the requirement of frontage consents and is without evidence to support a conclusion that the proposed use has any different effect on the public health, welfare, safety and morals than the other permitted uses in the district.

Since we find no basis for the exercise of the police power in prohibiting the home for the aged in the apartment-house-use district, the ordinance as applied to this proposed use is an unconstitutional deprivation of property without due process of law (*Spies v. Board of Appeals*, 337 Ill. 507; *State of Washington ex rel., Seattle Title Trust Co. v. Roberge*, 278 U. S. 116, 73 L. Ed. 210). Accordingly, the judgment of the trial court is affirmed."

It is on the basis of the court's decision in this case that we deleted from Chapter 136 the requirement of frontage consent.

Since the same words and provisions for the need of frontage consent in the operation of nursing homes, sheltered care homes and homes for the aged appear in Chapter 40-10 of the Municipal Code of Chicago, we must give said Chapter 40-10 a consistent meaning. We, therefore, take the position that the restrictions in said above Chapter as to homes are likewise unconstitutional.

In view of the above, it is our opinion that if an applicant has complied with the zoning and building laws of the Municipal Code of the City of Chicago, the provisions in Chapter 40-10 of said Code insofar as it relates to homes is no longer enforceable and that a permit for the construction of a home should be issued to the applicant by the Board of Health.

WITHDRAWAL OF CONSENTS

(No. 12291—*Commissioner of Buildings—E. W. P.—July 21, 1959.*)

We have your letter of July 13, 1959, in which you advise that you had issued a permit on May 6, 1959 for the construction of a bowling alley at 6310 West Grand Avenue, but that upon discovery that adequate off-street parking had not been provided you took action to revoke the permit on July 16, 1959. You state further that the applicant resubmitted plans for an amended permit which will satisfy the off-street parking.

You request our opinion as to whether or not the frontage consents which were submitted with the original application are still in force and effect, and whether you should request the submission of new frontage consents.

You followed your inquiry with another letter, dated July 15, 1959 in which you enclose petitions and affidavits protesting the construction of the bowling alley, signed by the owners of frontages who purportedly signed frontage consents which accompanied the original application for a permit, but who are now either denying that they ever signed the consents or gave anyone authority to do so, or withdrew their consents contending that the situation was misrepresented to them by the applicant or his agent. Without the frontages owned by the property owners who are protesting and withdrawing their consents, the applicant would have little or no consents, certainly wholly insufficient to comply with the Municipal Code.

Commencing with the year 1925, the Law Department has on several occasions rendered opinions regarding the revocation of frontage consent signatures. It is a well settled principle of law that until the administrative officer whose duty is to issue a permit which requires frontage consents has acted by the issuance of the permit, the consents of the persons signing the frontage consents may be withdrawn. This general rule was laid down in the case of *Thuerer v. People*, 211 Ill. 296, in which case the Court said:

"William M. Alister signed for 280 feet of frontage, but on July 22, 1902, he withdrew his name from the application. The right of a petitioner to withdraw his name from a petition at any time prior to the time the tribunal created by law to pass upon and determine the proposition submitted by the petition has finally acted is settled by this court in *Littell v. Board of Supervisors*, 198 Ill. 205. The petition in that case was filed under the Act of 1895 for the creation of a new town. The court, on page 208, said: 'Our examination of the decisions cited by counsel on either side from other courts on analogous statutes has led us to the conclusion that the act of signing such petition is not an irrevocable act, and that it may be revoked at any time before the jurisdiction of the body authorized to act has been determined by it.'"

Again on page 305 the Court said:

"In *Slingerland v. Norton*, 59 Minn. 351, also a county seat case, the Supreme Court of Minnesota said (p. 357): 'We have no doubt of the right of any of the signers to withdraw his name from the petition at any time before the Board of County Commissioners has completed its inquiry and determination in the matter of purging the petition committed to it by the statute. This right is an absolute one, which the petitioner may exercise on his own motion, without assigning any reason therefor or obtaining leave to do so from anyone.'"

The Building Department acting upon the authority of Chapter 43 (Building Permits), Paragraphs 10 and 24 revoked the original permit for the construction of the bowling alley.

The law is well established that "a municipal permit issued illegally or in violation of the law, or under a mistake of fact, confers no vested right or privilege on the person to whom the permit has been issued and may be revoked notwithstanding that he may have acted upon the permit; any expenditures made in reliance upon such permit are made at his peril. Cf. *Valicenti's Appeal*, 298 Pa. 276, 148 A. 308; *Ventresca v. Ealey*, 358 Pa. 98, 56 A. 2d 210; *Giordano v. Mayor and Council of Borough of Dumont*, 137 N. J. L. 740, 61 A. 2d 245, 6 A. L. R. 2d 956. See annotation 6 A. L. R. 2d 960-982".

The Commissioner of Buildings has, therefore, been put on official notice by all of the property owners within the community where frontage consents are required, that frontage consents have been withdrawn, or were never given initially.

It is, therefore, our opinion that no valid permit was ever issued and there are now no valid frontage consents. Permit cannot issue without compliance with Section 40-7 of the Code.

FRONTAGE CONSENTS—UNCONSTITUTIONAL

(No. 12347—Commissioner of Health—E. W. P.—June 27, 1960.)

We have your letter, dated June 13, 1960, in which you enclosed copies of correspondence received from Marshall M. Holleb, Attorney-at-Law, at 33 North LaSalle Street, pertaining to the legality of frontage consents in connection with the building of a hospital at the northwest corner of Hollywood Avenue and Sheridan Road.

The two ordinances relative to the requirement of frontage consents for hospitals are contained in Sections 40-11 and 137-8 of the Municipal Code of the City of Chicago. These sections provide that the owners of a majority, of the frontage must consent in writing to the construction of a hospital, in the event that two thirds of the buildings fronting on both sides of the street are devoted exclusively to residential purposes.

In the *Valkanet v. City of Chicago* case, 13 Ill. 2d 268, which pertains to the requirements of Sections 40-10 and the old 136-6, relating to nursing homes as to frontage consents, the Supreme Court held the sections unconstitutional and more recently in the *Drovers Trust and Savings Bank v. City of Chicago*, 18 Ill. 2d 476, the Court ruled that the requirements for frontage consents generally are unconstitutional and void. In the *Drovers* case the Court said at page 479:

"The plaintiff's right to conduct a legitimate business in a district, in which the contemplated business is permitted, can not be left to the whim and caprice of neighboring owners. The procuring or non-procuring of frontage consents has no bearing upon the public health or welfare, and such a requirement is an unwarranted and unauthorized exercise of the police power.

"This is not to say that the city can not impose separate requirements on this property in addition to zoning restrictions. Other ordinances may validly regulate the manner in which a permitted use is carried on, the way in which buildings are erected or maintained, and the like, but such other ordinances must be reasonably designed to insure standards of health and safety. These frontage consent provisions do not encompass any governmental objects not already included within the scope of the zoning ordinance, as does a building code or health ordinance."

We are, therefore, of the opinion that frontage consents are not necessary for the location or maintenance of the proposed hospital.

CHAPTER VIII—PUBLIC UTILITIES

A. RAILROADS

ARMED SPECIAL POLICEMEN

(No. 11799—Commissioner of Police—M. I. W.—March 31, 1954.)

In your letter of January 22, you transmit a letter received by you from the Superintendent of Police of the Pennsylvania Railroad in which he requests clarification of the provisions of chapter 173 of the Municipal Code of Chicago. The specific question asked is whether special policemen employed by common carriers within the City of Chicago may legally carry their firearms from their place of employment to their homes and return.

Section 173-11 of the Municipal Code reads as follows:

"Every special policeman shall conform to and be subject to all the rules and regulations governing police officers of the city and to such additional rules and regulations as the commissioner of police may make concerning special policemen. Special policemen shall possess all the powers of the regular police patrol at the places for which they are respectively appointed or in the line of duty for which they are engaged."

The general prohibition of the carrying of concealed weapons is found in chapter 38, section 155, Illinois Revised Statutes, 1953 in which an express exemption from the prohibition found therein is granted to:

"* * * the following employees or agents while engaged in the discharge of the duties of their employment; conductors, baggagemen, messengers, drivers, watchmen, special agents and policemen employed by railroads or express companies; * * *"

A substantially similar exemption from the prohibition against carrying concealed weapons is found in the ordinance dealing with the same subject which after the prohibition provides an exception for various law officers and for:

"the following employees, or agents while engaged in *the discharge of the duties of their employment*; conductors, baggagemen, messengers, drivers, watchmen, special agents and policemen employed by railroads or express companies." Section 193-30 Municipal Code of Chicago. (Emphasis added.)

In a manual prepared by the Pennsylvania Railroad for its police officers which was forwarded with your communication, we find the following language in Regulation No. 29 on page 19:

"Each member of the Police Service shall devote his whole time and attention to the business of the Company and is expressly prohibited from following any other calling or being employed in any other business. Although certain hours may be allotted for the active performance of duty on ordinary occasions, *yet at all times members are on duty and must be prepared to act immediately on notice that their services are required.*" (Emphasis added.)

The railroad explains that on the occurrence of a wreck, for example, special police may be called at their homes and ordered to the scene of the wreck to protect property, that it is essential for them to arrive at the scene as quickly as possible with firearms in their possession, and that they therefore must have said firearms with them at their homes at all times which in turn would require that they carry these weapons to and from their principal place of assignment each day.

As will be noted from the statute and ordinances above, the exemption from the prohibition against carrying concealed weapons expressly excludes railroad employees. This exemption is limited by similar language appearing in both, to the named persons "while engaged in the discharge of their employment." The narrow question is thus whether carrying weapons to and from their homes may be said to be covered by the term "while engaged in the discharge of the duties of their employment."

We are unaware of any Illinois decision bearing on this precise point. The general rule has been stated to be as follows:

"An officer who is entitled to carry a weapon in the performance of his duties and who complies in other respects with the statutory requirements, has a right to carry the weapon in going to and returning from the place of such performance." 68 C. J. p. 39, section 31.

In the case of *State ex rel. Middlecamp v. Hazelett et al.*, 119 S. E. 177, 94 W. Va. 436 (1923), it was shown that the defendant pursuant to statute had applied for a license to carry a pistol as a railway conductor "while in the discharge of his duties and while in charge of the car or train conducted by him". In an action brought against the conductor and a surety company on the bond executed for damages accruing to anyone from the improper use of the weapon, the court considered whether the defendant in carrying the gun to his room in a boarding house was outside the scope of the statute. The Supreme Court of Appeals of West Virginia said:

"Necessarily, a conductor so authorized to carry a deadly weapon would not be limited in his right or obligation to the time he was actually on his car or train. A reasonable time would have to be granted for his going to and coming from his train at both ends of his run, for taking his meals, and for his rest at night. It would not be within the proper rules of construction to hold him guilty of a violation of the statute while so carrying his pistol."

In *Wallace v. Commonwealth* (Court of Appeals of Kentucky), 246 S. W. 466, 197 Ky. 233 (1923), it was likewise held that a statute authorizing the carrying of deadly weapons by officers "in the discharge of their official duties" was broad enough to extend to a game warden "going to and returning from" a trip made to make an arrest.

It is our opinion that these decisions applied to the Illinois statute and the concealed weapons ordinance, make it permissible for special policemen employed by common carriers within the City of Chicago to carry their firearms from their place of employment to their homes and return, in view of the nature of the duties for which they are engaged which may call them from their homes to different places on immediate notice.

While substantial reasons occur to us which suggest that the railroads ought, in their own interest, seriously consider the wisdom of permitting this practice, and to explore other possible alternatives such as keeping a weapon at the regular place of assignment with another one at home available for use during the occasional emergency, these are considerations beyond the scope of the narrow legal question presented for our opinion.

However, since every special policeman in the City of Chicago is subject to "such additional rules and regulations as the commissioner of police may make concerning special policemen" (sec. 173-11 of the Municipal Code),

it would appear to be within your power to make a determination of this question as a matter of policy. If you should decide not to permit this practice, special policemen violating such a rule would not be guilty of violating the concealed weapons statute and ordinance but rather of violating a rule of the commissioner of police. On the other hand if you feel that as a matter of policy you should permit such special policemen, because of the nature of their duties or the limited possibility of storing weapons, to carry weapons to and from work, you are free to do so without countenancing any violation of law.

SWITCH TRACKS AS NUISANCE

(No. 12018—Alderman, 9th Ward—E. J. K.—February 29, 1956.)

We received your letter of January 26, 1956, enclosing a copy of the above mentioned proposed ordinance. Your letter requests our advice in regard to the matter involved and an opinion on the proposed ordinance.

The complaint which apparently prompted the submission of said proposed ordinance by the Improvement Association consists of an allegation that the manner in which the railroad company operates trains in its switch yard is a public nuisance and a menace to public health, comfort and safety of residents of the community of Cottage Grove Heights and particularly to those residents whose property abuts upon said switch yard.

The objection as stated in the ordinance is that the operation of the switch yard by its nature, and in its normal use and operation creates and disseminates a tremendous volume of noise of a most disagreeable and obnoxious character, particularly when cars are bumped in the process of assembling trains. It is also alleged that the operation creates heavy impacts and vibrations and gives off an unusual volume of oily vapors, causing layers of greasy dirt difficult to remove.

We have had conferences regarding the matter with Mr. Theodore H. Zimmerman, President of the Improvement Association and with Messrs. Tom Megan, Attorney, John H. Calfillan, Superintendent, J. M. Aydelopp, Assistant Superintendent and James Marscill, Assistant Engineer of the Railroad Company. Mr. Zimmerman contends that the railroad company is using the switch yard to assemble and classify cars and trains that have no connection with the service of the industries in the immediate vicinity of the yards. This, the railroad representatives deny. It is agreed, however, that the use of the yard has increased since the Chicago Rock Island and Pacific Railroad Company purchased the Pullman Railroad Company, which formerly owned the yard, on January 1, 1950.

The railroad representatives have given us a drawing of the yard showing its tracks and surroundings in the year of 1927 and a recent drawing of the same location. These representatives state the position of the present owner of the yards is that only a small portion of home owners whose property abuts the tracks in the switch yard are bothered or harmed to any great extent by the switching operations, that these owners purchased their property with the knowledge of the location of the tracks and yard and should have foreseen the possible expansion of railroad yards located in the Lake Calumet industrial area. They further contend that the switch yard is only used in connection with serving industries close to the yard, that the number of industries is increasing rapidly, that the matters complained of will be worsened in the future and that the railroad company is now doing most of its switching during the day and will avoid as much as possible switching during the night. They claim, however, that they have very little control over the matter as they cannot determine the time of arrival of the trains and in handling them after arrival the instructions of the consignees must be considered.

Section 23-61 of Chapter 24 Illinois Revised Statutes provides that cities have the power "to define, prevent and abate nuisances".

The most recent Illinois Supreme Court decision involving this section of the statute as applied to railroad operations appears in 387 Ill. 109 in the *City of Kankakee, Appellee v. New York Central Railroad Company, Appellant*.

The opinion of the Court in this case in part is as follows :

"In October, 1942, the city of Kankakee filed in the circuit court of Kankakee County its complaint praying an injunction issue against the New York Central Railroad Company, appellant, to abate an alleged nuisance. The complaint alleges the existence of an ordinance prohibiting anyone in charge of any smokestack of a locomotive or other machine, or of a chimney in any building, from allowing the emission of dense smoke for a period aggregating six minutes in the hour, or allowing the escape from any smokestack in the open air of such quantities of ash, dust, cinders, or other material or noxious gases as to cause injury to others, a violation of which is declared to be a nuisance; that appellant did permit the emission of dense smoke from the chimneys of a certain roundhouse in the open air, to the damage of inhabitants living near said railroad property, and that the acts charged constitute a nuisance and damage the property, health, peace and comfort of the general public, and prays for an injunction requiring appellant to abate the nuisance. * * *

"Section 1. It shall be unlawful for any person owning or in charge of any smoke stack of any locomotive, tar kettle, steam machine or contrivance, or of any open fire, smoke stack, or chimney of any building or premises to allow the emission of dense smoke except for a period of or periods aggregating six minutes in any one hour at the time when the firebox is being cleaned out or a new fire being built therein. Such emission of smoke is hereby declared to be a nuisance and may be summarily abated by the building inspector in charge or by anyone whom he may duly authorize for such purpose. Such abatement may be in addition to the fine hereinafter provided.

"Section 2. No person shall cause or allow the escape from any smoke stack or chimney into the open air of such quantities of ash dust, soot, cinders, acid, or other fumes; dirt or other material or noxious gases in such place or manner as to cause injury, detriment, nuisance, or annoyance to any person or to the public or to endanger the comfort, repose, health, or safety of any such person or the public, or in such a manner as to cause or have a natural tendency to cause injury or damage to business or property. Such escape of such materials, gases, or fumes is hereby declared to be a nuisance and may be summarily abated in addition to the fine hereafter provided. * * *

"A large part of the argument of both the parties is devoted to the question whether it is within the power of the city to pass an ordinance of this kind, insofar as it affects a public utility, because of the numerous holdings that the sole power of regulating railroads and other public utilities is vested in the Illinois Commerce Commission. This question can arise only where the city has enacted an ordinance which is otherwise valid, for if the same were nugatory and void, because of its being arbitrary and unreasonable, or because of the improper delegation of discretionary authority to an administrative officer, no question could arise as to the jurisdiction of the city or the Illinois Commerce Commission. * * *

"A considerable number of houses are located in the immediate neighborhood of the railroad yards and shop, the occupants of which testified that smoke and soot and dirt and ashes are cast upon them as the smoke emanates from the roundhouse or engines, causing annoyance and discomfort to person and property. It was against this situation the ordinance was directed. * * *

"The complaint was based upon the emission of smoke from cleaning the fireboxes and rebuilding the fires, which is prohibited by section 1 of the ordinance; and also alleges a violation of section 2 by reason of the fact that such smoke has damaged the inhabitants of the neighborhood by falling upon the draperies in their houses and upon the laundry being dried in their yards. If the ordinance is construed to prohibit the emission of dense smoke for but six minutes in the hour, it would, so far as defendant is concerned, if enforced, be practically prohibitive. Each engine requires a dumping of the fire and the building of a fire, which would mean an average of eighty occasions in twenty-four hours of causing smoke, either by wetting down the fire dumped into the pits, or by building new fires in the engines. The ordinance would allow less than two and one-half hours for eighty operations, without taking into consideration smoke caused by engines going into the yards or coming out of the yards having occasion to increase their fires to get up the requisite amount of steam. Assuming one engine could be serviced without the emission of dense smoke for over six minutes, in order to comply with the ordinance an average of more than three engines must complete their operations simultaneously, or be subject to a penalty of a fine of \$25 per day and summary abatement * * *.

"We are of the opinion that the ordinance in question is unreasonable and arbitrary, at least in its operation upon the business of the defendant, and that an unlawful discretion was vested in the building inspector in that an unwarranted delegation of authority and discretion to exercise summary power was vested in him without defining the terms and conditions under which such discretion could be exercised, and consequently the ordinance is void and of no effect. There being no valid ordinance enacted it becomes unnecessary to comment upon the alleged conflict of authority between the city and the Illinois Commerce Commission with respect to the former's authority to enact a proper ordinance which would apply to a public utility.

"The ordinance being void in so far as it affects the appellant, the decree of the circuit court of Kankakee county should be and is hereby reversed."

In an earlier case reported before the passage of the Public Utilities Act in 259 Ill. 391 entitled *The City of Bushnell, Plaintiff in Error v. The Chicago, Burlington and Quincy Railroad Company, Defendant in Error*, the Court in its opinion in part stated as follows:

"The Chicago, Burlington and Quincy Railroad Company was sued by the city of Bushnell for a violation of a city ordinance. On the trial the circuit court sustained an objection to the introduction of the ordinance in evidence and directed a verdict of not guilty. The validity of the ordinance being involved, a writ of error has been sued out of this court, the trial court having certified that the public interest so required.

"The ordinance was passed and duly published in May, 1912. It established within the city a business district, within whose limits the maintenance or operation of any siding or switch track for setting out, switching, storing, making up or passing freight cars, freight trains or engines used therewith, or for loading or unloading freight cars or trains, was declared to be a nuisance, for the maintenance of which a penalty was imposed * * *.

"The only question involved is the validity of the ordinance. The law authorizes the city to declare what shall be a nuisance, but this does not authorize it to act arbitrarily and declare that to be a nuisance which is not, in fact, a nuisance. (*Village of Desplaines v. Poyer*, 125 Ill. 348.) Some things are in their nature nuisances and are so recognized by the law. Other things are of such a character that in

their nature they may be nuisances but as to which honest differences of opinion may exist among men of impartial minds as to whether they are actually nuisances or not. The maintenance of slaughter houses or livery stables, the depositing of offal and of the carcasses of dead animals within the city, or the obstruction of sidewalks for the display of merchandise, are of this class. In this class of cases the exercise by the city of the legislative authority to declare what shall be a nuisance is conclusive of the question. If it declares the thing a nuisance it is a nuisance. (*North Chicago City Railway Co. v. Town of Lake View*, 105 Ill. 207; *Harmison v. City of Leavistown*, 153 id. 313; *Laugel v. City of Bushnell*, 197 id. 20.) In another class are those things which in their nature are not nuisances but which may become nuisances by reason of their locality, surroundings or the manner in which they are conducted. The city has no power to declare conclusively such things to be nuisances but can only declare such of them to be nuisances as are in fact so. (*Village of Desplaines v. Poyer*, *supra*; *Laugel v. City of Bushnell*, *supra*; *Sings v. City of Joliet*, 237 Ill. 300; *Yates v. City of Milwaukee*, 10 Wall. 497; *City of Evansville v. Miller*, 146 Ind. 613; *City of St. Louis v. Heitzenberg Packing and Provision Co.*, 141 Mo. 375; *City of Denver v. Mullen*, 7 Colo. 345; *Grossman v. City of Oakland*, 30 Ore. 478; *City of Helena v. Dwyer*, 64 Ark. 424) * * *.

"The switching of cars and the use of locomotive engines for that purpose are necessary for the transaction of its business, and neither the existence of the side-tracks, nor their use in switching, nor the use of locomotives for that purpose can be prohibited * * *. Then the city went on to prove, not that the thing denounced by the ordinance as a nuisance,—that is, the maintenance and use of the side-tracks,—was a nuisance, but that the manner of their use so as to cause an obstruction and congestion of street traffic for from one-fifth to one-third of the time, to obstruct the view of approaching trains, to increase the danger to the public at the crossings, to inconvenience and damage the public and the property in the neighborhood by the excessive noise, confusion, dust, smoke and dirt, created a nuisance * * *.

"The ordinance contained a preamble which recited the manner in which the use made of the side-tracks was productive of public injury and annoyance, but this amounted only to a statement of the reasons which induced the passage of the ordinance. The ordinance did not denounce the operation of side-tracks in the manner mentioned in the preamble as a nuisance but declared any use of sidetracks within the prohibited territory a nuisance. If valid, the ordinance became a law within the municipality, and it was not a question of fact whether the use made of the side-tracks in fact constituted a nuisance, but the mere maintenance or any use of a side-track within the prohibited territory became unlawful. The power of the city council did not go to this extent, but only to the extent of declaring under what conditions the maintenance or operation of side-tracks should be regarded as a nuisance. Whether such conditions were reasonable would be a question of law; whether the side-tracks were maintained or operated under such conditions a question of fact. An ordinance could not be valid which declared a certain thing to be a nuisance and yet left it to the jury to determine, from the evidence in each case, whether that thing was or was not a nuisance * * *. The fact that damages may be recovered by a property owner who is injured by a structure or business does not show such structures or business to be a public nuisance. A railroad built and operated by authority of law cannot be held to be a nuisance although damages occasioned by it to adjoining property may be recovered. *Chicago, Milwaukee and St. Paul Railway Co. v. Darke*, 148 Ill. 226 * * *."

For the reason that it has a direct bearing on the switchtracks involved herein and the area in which said tracks are located, we call your attention to the decision of the Illinois Supreme Court in a case entitled *Chicago Rock*

Island and Pacific Railroad Company v. Illinois Commerce Commission, ex rel. Illinois Central Railroad Company, 414 Ill. page 134, rendered in March of 1953. The switch tracks under consideration herein are involved in this case, because it was on January 1, 1953 that the Chicago Rock Island and Pacific Railroad Company acquired the properties of the Pullman Railroad Company, including such switch yards and this transaction and the litigation were brought about because of the importance of the Lake Calumet Harbor area as an industrial center and the said Switch tracks are located therein.

In this case the opinion of the Court in part is as follows:

"* * * From 95th Street to a point just south of 119th Street, the Pullman railroad lines lie a considerable distance east of the Illinois Central and the Kensington, and between those lines and harbor area * * *.

"In 1906 Pullman was incorporated. Its predecessor, Pullman Palace Car Railroad Company was constructed in 1880, Between 1877 and 1880 Pullman interests purchased nearly 4000 acres of land between 87th Street on the north and 138th Street on the south, extending from the Illinois Central tracks to the western shores of Lake Calumet. Three thousand acres have been sold, of which 1000 acres are now occupied by industries * * *.

"It appears that the Pullman-Rock Island is presently serving 21 industries in the territory adjacent to the proposed Lake Calumet harbor area. These industries occupy 1000 acres and are served by nearly 300 miles of track. It further appears that during the year of 1946 Pullman handled 50,000 cars from and to its industries. It further appears that from 95th Street to 130th Street at the present time no railroad other than Pullman has any trackage whatsoever in the territory involved here * * *.

"On this record the commission found that there are extensive plans for the industrial development of the South Lake Calumet area * * *.

"There are indications that there will be other interests in the area which will require the services of railroads. Pullman has indicated its willingness to locate in the area. The industries fringing the area are all served by Pullman * * *."

In addition to the above mentioned authorities which deal directly with the matter under consideration, that is with a nuisance ordinance, there is another line of decisions of the Supreme Court of Illinois which involve City Ordinances based on enabling statutes which gave to cities certain powers over the operation of railroads. These cases hold that the Public Utilities Act creating the Illinois Commerce Commission vested in the Commission complete jurisdiction over the operation of railroads in the State and in the year of 1925 in the case of *Village of Atwood v. The Cincinnati, Indianapolis and Western Railroad Company*, 316 Ill. 425 the opinion of the Supreme Court of Illinois in part stated as follows:

"* * * The ordinance declared that such a flagman was necessary for the safety of the general public, and subjected the railroad company, for its refusal or neglect to comply, to a fine of not less than \$10 for each day's default * * *.

"The sole question presented for determination is whether the president and board of trustees of the village of Atwood had the power to pass the ordinance Sub-section 27 of section 1 of article 5 of 'An act to provide for the incorporation of cities and villages,' approved April 10, 1872, in force July 1, 1872 (Cahill's Stat. 1921, p. 447), expressly confers upon cities and villages organized under the act the power 'to require railroad companies to keep flagmen at railroad

crossings of streets, and provide protection against injury to persons and property in the use of such railroads' * * *.

"The General Assembly, in its discretion, withdrew from cities and villages the power here sought to be exercised by the appellant and vested it in the Commerce Commission, another agency of government. That a part of sub-section 27 of section 1 of article 5 of the Cities and Villages act which conferred upon cities and villages organized under that act the power to require railroad companies to keep flagmen at railroad crossings of streets was repealed by the Public Utilities act * * *."

In the *City of Altamont v. The Baltimore & Ohio Railroad*, 348 Ill. an opinion of the Supreme Court in 1932 rendered the same decision in regard to sub-section 27 of Section 1 of Article 5 of the Cities and Villages Act.

The same conclusion was reached by the Supreme Court of Illinois in *Northern Trust Company v. Chicago Railways Company*, 318 Ill. 402, which involved the legality of a city ordinance requiring street railroads to equip their cars with brightly lighted headlights.

In view of the foregoing and in consideration of the facts of the matter on which we are informed we are of the opinion that the ordinance submitted to us by you if passed by the City Council would be invalid and more particularly for the following reasons:

1. The switch tracks existed and switching operations were conducted thereon for many years prior to the construction of homes located in the community of Cottage Grove Heights.

2. Section 1 of the proposed ordinance designates assembling, disassembling or siding of freight cars, without qualification as to manner on the trackage between W. 95th Street and W. 103rd Street paralleling Avalon Avenue a nuisance which would prohibit any switching in said area which might not be objectionable.

3. The Ordinance shows on its face that home owners in only a small area are effected by the operation of said switch tracks and not the public at large and four paragraphs of the preamble of the Ordinance refer to residents whose property abuts said switch yards particularly those residing along Avalon Avenue between W. 97th and W. 99th Streets.

4. The second paragraph of the preamble recites that the switch yard by its nature, and in its normal use causes all the objectionable things which the Ordinance would establish as a nuisance and Section 1 of the Ordinance would prohibit assembling and disassembling or siding of freight cars in a certain area as a nuisance in that area only, although said use is normal. The Ordinance would be objectionable as it prohibits operation of something that is not inherently a nuisance without showing in the Ordinance under what conditions the otherwise legal operation of the said switching becomes a nuisance. The recitals in the preamble do not suffice in this respect.

5. The facts as disclosed by the proposed Ordinance clearly show that the enforcement of such an Ordinance would be an attempt on the part of the City to regulate the operation of said railroad company in regard to switching operations.

The Illinois Commerce Commission would have exclusive jurisdiction over a matter of this kind and if you wish we will prepare an order to be presented to the City Council directing the Corporation Counsel to file a petition before the Commission requesting it to enter an order directing the said railroad company to operate its said switch tracks in a manner that will not be a menace to public health, comfort and safety.

In view of the fact that the interests of certain property owners and not the public at large would be involved in the proceeding before the Com-

mission and the further fact that the particular owners may desire or be compelled to proceed in a court of law to get adequate or complete relief if the matter is disposed of by unsatisfactory order of the Commission, it might be to the advantage of the interested property owners and the above mentioned Improvement Association to be petitioners in the proceedings before the Commission and in that event the City could enter the proceedings as an intervening petitioner in order to support the petitioners in the matter.

FENCING RAILROADS RIGHT-OF-WAY

(No. 12057—Alderman, 13th Ward—E. J. K.—July 20, 1956.)

Supplementing our letter to you of June 22, 1956, regarding the above entitled matter this is to inform you that we have received a letter dated July 17, 1956, from the Belt Railway Company of Chicago informing us that the management of the railroad company has concluded that there is no legal responsibility upon it for the fencing of its right of way at the said location.

We have also received from the same railway company a letter also denying legal responsibility for fencing its right of way in the vicinity of W. 72nd Street and S. Avers Avenue. This information was sent to us in connection with a complaint sent to the Mayor's Office of Inquiry and Information by Mrs. Phyllis M. Seivert of 6732 S. Marshfield Avenue.

The Grand Trunk Railroad Company in a letter dated July 12, 1956, informed us that on August 24, 1954, it notified the Southwest Property Owners Association that it was willing to co-operate by erecting a fence on its right of way between W. 71st Street and W. 74th Street at Central Park Avenue, provided they would pay one half of the cost or \$500.00. This information was sent to us in connection with a complaint sent to the Mayor's Office of Inquiry and Information by Mrs. C. Derby of 3451 W. 73rd Street.

These requests for fencing as aforesaid are made for the protection of children. Section 57 of the State of Illinois Public Utilities Act in part is as follows:

"The Commission shall have power, after a hearing and upon its own motion, or upon complaint, by general or special orders, rules or regulations, or otherwise, to require every public utility to maintain and operate its plant, equipment or other property in such manner as to promote and safeguard the health and safety of its employees, passengers, customers, and the public, and to this end to prescribe, among other things, the installation, use, maintenance and operation of appropriate safety or other devices or appliances including interlocking and other protective devices at grade crossings or junctions and block or other systems of signaling, to establish uniform or other standards of equipment, and to require the performance of any other act which the health or safety of its employees, passengers, customers or the public may demand."

On January 28, 1956, Leonard Harlock and others filed a petition in Docket No. 43048 before the Illinois Commerce Commission against the Chicago, Burlington and Quincy Railroad Company for an order directing said railroad company to erect a suitable fence or other barrier enclosing its right of way in the Village of Riverside for the safeguarding of the public. The petitioner testified that his grandchild was killed by a train of the said railroad company after the child ran onto the railroad tracks midway between Cowley Avenue and Herbert Road crossings in Riverside, Illinois. The child was three years of age.

The Commission in its order entered on May 22, 1956, in which it denied the prayer of the petition among other findings made the following:

"that the evidence does not show and the Commission has not been advised of any method by which the public may not enter upon the railroad tracks even though the right of way was fenced between the crossings, or how it would be possible for respondent to carry on its passenger and freight business and still fence its right of way at passenger depots and its freight and industry tracks, without the tracks being elevated;

that some hazard exists wherever small children have the opportunity to run onto railroad tracks, either between crossings or even at crossings where adequate protective facilities have been installed; and

that it does not appear that requiring respondent to fence its right of way in the Village of Riverside is warranted by the evidence herein; and that the prayer of the petition should be denied."

At our request and with the approval of Committee Chairman Alderman James F. Young, Mr. Earl Anderson, Engineer for the Utilities Committee of the City Council made an inspection of the above mentioned locations in Chicago.

Section 53 of Chapter 114 Illinois Revised Statutes of Illinois requires the construction of fences by railroad companies on both sides of their roads to prevent cattle etc. from getting on railroad tracks except within cities, towns and villages. There is no provision in the said statutes regarding the construction of fences by railroads for the protection of the people.

The present Municipal Code of Chicago contains no provision regarding the matter. Section 1141 of the Revised Code of Chicago 1931 required railroads to erect fences on both sides of their tracks and to maintain gates, signal bells and other safety appliances. The Supreme Court of Illinois has consistently ruled that Section 57 of the Public Utilities Act quoted above and other sections of said act give the Illinois Commerce Commission regulatory police powers over public utilities and it is probably this fact that was the cause of eliminating said Section 1141 from the present Municipal Code of Chicago.

Mr. Anderson has reported that at the locations above mentioned all the streets dead end at the railroad's right of way so that continuous fences could be erected thereon without interfering with traffic. In considering the need for fences at these locations only instead of all similar locations in the City it would appear to be a problem for the property owners, and the railroad company involved to work out and this seems to have been the idea of the Grand Trunk Railroad Company expressed in its above mentioned letter in which it offered to share the cost of erecting a fence with the particular property owners.

In view of the foregoing it appears to us that whatever help the City could give the property owners at said locations would be through communications or meetings between representatives of the City Council Utilities Committee, the said railroad companies and the property owners. However, if you feel that the matter should be brought before the Illinois Commerce Commission, further surveys and studies should be made regarding conditions and the number of accidents at the locations involved and other similar locations in the City before a petition is filed. The proximity of the railroad tracks and the homes at locations mentioned in this letter are certainly a hazard to small children living in the communities. However, any persons going on the right of way of the said railroad companies at said locations would be trespassers as there is no reason or occasion for the public generally to go upon such private railroad property.

A petition filed by the City would necessarily have to be based on the fact that public safety convenience and necessity require the erection of fences at locations shown in the petition. The City would have to present evidence to show this, which would include drawings showing conditions, testimony regarding accidents, the type of fence required etc. In the event the Commission ordered the construction of fences as requested in the petition, it would have the right to include in said order the apportionment of the initial cost of said construction and the cost of maintenance of said fences thereafter between the railroad companies and the City.

If you desire any further information regarding these matters, please inform us.

B. CHICAGO TRANSIT AUTHORITY

EXEMPTION FROM WEIGHT AND TRAFFIC REGULATIONS

(No. 11893—Commissioner of Streets and Sanitation—D. D. K.—April 12, 1955.)

In your letter of December 7, you request our opinion as to: (1) possible discrepancies in the definitions of "motor vehicle" as contained in Section 1 of the Illinois Motor Vehicle Act and in Section 27-1 of the Traffic Regulations of the City of Chicago; (2) the legality of contemplated ordinances involving turning restrictions, which ordinances would exempt CTA vehicles from their operation; (3) the legality of contemplated ordinances involving the fixing of load limits on City streets, which ordinances would exempt CTA vehicles from their operation; and (4) the right of the City of Chicago to impose load limits with respect to CTA vehicles on streets where the CTA has a franchise right to operate.

1. Your apprehensions concerning discrepancies in the definitions of "motor vehicle" as contained in the Illinois Motor Vehicle Act and in the City ordinance are unwarranted and easily allayed.

The portion of the Illinois Motor Vehicle Laws which deals with traffic regulation in all of its various aspects is known as the Uniform Act Regulating Traffic on Highways, Ill. Rev. Stat., 1953, Chap. 95½ Sections 98 through 239. Section 2(b) of said Act defines "motor vehicle" as:

"Every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails."

It will be noted that this definition is *identical* with the one contained in Section 27-1 of Chicago's ordinances.

Since it is the aforementioned Act, commonly referred to as UART with which we are here concerned and not Section 1 of the Motor Vehicle Act, which pertains to matters other than traffic regulation, then we see that there are no differences in the two definitions.

2. The two definitions of "motor vehicle" being identical, then it is clear that both the Act and the ordinances cover and affect all CTA vehicles other than those which operate upon fixed rails. Obviously, then, all CTA busses are required to obey signs regulating turns which have been posted pursuant to a *general* statute or ordinance. This being so, we

must now determine whether it would be legal to post turn restrictions, pursuant to ordinance, with signs containing the phrase "except CTA vehicles."

Section 25 of the UART, after providing for uniformity throughout the State, reads:

"* * * Local authorities may, however, adopt additional traffic regulations which are not in conflict with the provisions of this Act."

Section 26 provides:

"Powers of local authorities. (a) The provisions of this Act shall not be deemed to prevent local authorities with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power from—

* * * * *

8. Regulating or prohibiting the turning of vehicles or *specified types of vehicles at intersection.*" (emphasis ours.)

The language of these two Sections would seem to give the City a free hand in regulating turns at intersections so long as such regulation is a reasonable exercise of the police power. Now, is the regulation here contemplated a reasonable exercise of the police power?

In the fairly recent case of *In re Seltenreich*, 244 P 2d 587, the Criminal Court of Appeals of Oklahoma decided the constitutionality of a municipal ordinance almost identical to the type here contemplated. In that case, an ordinance of the City of Enid prohibited left turns generally at various intersections, except that it permitted a left turn at one of the intersections by passenger busses operating within the City. The ordinance was attacked for being unreasonable as discriminating in favor of intracity busses. The court, in an extremely well reasoned opinion, held that the ordinance was not violative of the Oklahoma Constitution or Statutes, and that the exception made in favor of intracity passenger busses was a reasonable classification in the light of the myriad problems of traffic control, congestion, public safety, public convenience, etc. which confront the modern large city.

It is our opinion then, that the posting of turn restrictions, pursuant to ordinance, and on streets under the City of Chicago's jurisdiction, with signs containing the phrase "except CTA vehicles" would be a legal and reasonable exercise of the City's police power.

3. Again, by the very definition contained in Section 2(b) of the UART, all CTA busses are included in the operation of that Act's provisions. Consequently, it is obvious that all CTA busses are required to obey signs establishing load limits on a street, which have been posted pursuant to a general statute or ordinance.

The question now arises, would it be legal to pass an ordinance imposing load limits on a street, if it contained the phrase, "except CTA vehicles"?

Looking at Section 26 of UART again, it reads:

"(a) The provisions of this Act shall not be deemed to prevent local authorities with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power from—

* * * * *

7. Restricting the use of highways as authorized in Article XVI of this Act."

Now Article XVI is comprised of Sections 124 through 135 of UART. The entire Article is devoted to problems of size, weight and load. Section 131, UART, sets up maximum weight limits for all types of vehicles to operate uniformly throughout the State. The limit set for two-axle motor vehicles (which type, we believe, includes all CTA busses) is 36,000 pounds. An exception is made in sub-section (c) which permits Cities having a population over 50,000 to increase said limit by ordinance to a maximum of 40,000 pounds.

Section 134(c) of UART provides:

"Local authorities with respect to highway's, under their jurisdiction may also, by ordinance or resolution, prohibit the operation of trucks or other commercial vehicles, or may impose limitations as to the weight thereof, on designated highways, which prohibitions and limitations shall be designated by appropriate signs placed on such highways".

This Section manifestly reserves to Cities certain powers over weight limitations upon streets under the City's jurisdiction. The apparent intent of the Legislature was to give the City a fairly free hand in the exercise of its police power over these problems of weight and load, so long as this exercise of power is reasonable and not in conflict with the Act.

We believe that the same reasoning could be applied to justify an ordinance of the type here under discussion, as was applied above to justify the exception of CTA vehicles from a turning prohibition ordinance. Again, the consideration of public safety, public convenience, etc. in a City of the great size of Chicago are applicable. We believe that these considerations would make the classification here contemplated a reasonable one.

It is our opinion then, that it would be legal to pass an ordinance imposing load limits on a street, if it contained the phrase "except CTA vehicles", provided, of course, that the street in question is under jurisdiction of the City of Chicago.

4. The City of Chicago, by virtue of Sections 26-7 and 134 of UART, has authority to regulate load limits on its streets, so long as such regulation is not in violation of the Act. Since this power in the City applies to all motor vehicles covered by the Act, it applies with equal force to all CTA busses, unless, of course, this power has been limited by some franchise agreement with the CTA.

This particular subject was discussed in an opinion to the City Collector written on February 17, 1948, 22 OP. Corp. Coun. 493, wherein it was concluded that the CTA was subject to the Chicago wheel tax ordinance, since nothing in the franchise ordinance of April 23, 1945, specifically exempted the CTA from this tax. Similarly, it was also concluded that the CTA was subject to the City license provisions with regard to the transportation of flammable liquids.

The CTA was granted the right to use certain Chicago streets by virtue of an ordinance passed by the Council on April 23, 1945 (p. 3384 C. J.), approved by popular vote on June 4, 1945, and accepted by the CTA on June 10, 1945. Nowhere in this franchise agreement is any mention made of load limits or the relinquishment of the power of the City to regulate over them. The inference is then, that the Council intended to retain this power in the City.

It is our opinion that since nothing in the franchise ordinance of 1945 specifically exempts the CTA from the operation of such power, then the City of Chicago can impose load limits with respect to CTA vehicles even on streets where the CTA has a franchise right to operate.

SMOKING ON C. T. A. VEHICLES

(No. 11918—Chairman, Committee on Licenses—A. F. G.—June 27, 1955.)

In your letter of June 15, 1955 you request us to prepare an ordinance prohibiting smoking of cigarettes, cigars, pipes, etc. in street cars, elevated trains, subways, buses and other public conveyances operating within the city, and further request our opinion as to the legality of such an ordinance.

In 1948 this office was called on to advise a council committee as to the validity of an ordinance prohibiting smoking in public elevators and retail stores employing more than fifteen persons. We held in that opinion which is published in full in Vol. XXII, "Opinions of the Corporation Counsel" at page 286 that the ordinance was a valid enactment.

Municipalities in Illinois have been granted power by the "Revised Cities and Villages Act", "to regulate fire hazards" and "To do all acts and make all regulations, which may be necessary or expedient for the promotion of health or the suppression of disease",

The carrying of lighted cigarettes and cigars in crowded street cars, buses, etc. creates a fire hazard, and smoking tobacco in any form under the same conditions is inimical to public health. The city council has power by the above enactments to adopt reasonable regulations to protect the public against such conditions.

In *City of Zion v. Behrens*, 262 Ill. 510, the Supreme Court of this State in considering an ordinance regulating smoking in public places said:

"* * * Recognizing that tobacco smoke is offensive to many persons, and in exceptional cases harmful to some, we have no doubt that power exists to prohibit smoking in certain public places, such as street cars, theatres, and like places where large numbers of persons are crowded together in a small space."

We call your attention to the fact that the Chicago Transit Authority with respect to smoking on its vehicles has adopted the following rule:

"Smoking or spitting upon platforms or within cars and buses is strictly prohibited and trainmen are instructed to use good judgment and tact in enforcing the observance of this rule."

In addition the Chicago Transit Authority conspicuously displays on each of its vehicles a placard requesting its patrons as a public health measure to observe the "No Smoking" regulations.

Prior to October 13, 1915 smoking was permitted on the front platforms of surface cars and on special smoking cars on the elevated railroads. On that date an order was issued by the department of health prohibiting smoking on all public conveyances within the city. The order was posted in all cars and violators were threatened with conviction and fine (Report and Hand Book of the Department of Health of the City of Chicago, 1911 to 1918, inclusive, page 108).

This order has not been repealed and is still in effect and applies to the vehicles of the Chicago Transit Authority and other public conveyances not under the jurisdiction of the Illinois Commerce Commission.

We have prepared and transmit herewith draft of the requested ordinance and we are of the opinion that the proposed ordinance as drafted can be sustained as a reasonable exercise of the police power delegated to the City.

UPRIGHT EXHAUST ON BUSES

(No. 11951—Alderman, 10th Ward—R. N.—September 8, 1955.)

This department has not drawn up an ordinance requiring upright exhausts on buses as requested by you for the reason that, in our opinion, the city is without authority to impose such a requirement.

The power of the city to regulate motor vehicles is derived from the State Uniform Act Regulating Traffic on Highways. Article XV, § 116 provides:

"Mufflers, prevention of noise. Every motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise and annoying smoke, and no person shall use a muffler cutout, bypass or similar device upon a motor vehicle on a highway." (I. R. S. 1955, Ch. 95½, § 213.) Article II. §§ 25 and 26 provide:

"§ 25. Provisions of act uniform throughout state. The provisions of this Act shall be applicable and uniform throughout this State and in all political subdivisions and municipalities therein, and no local authority shall enact or enforce any ordinance rule or regulation in conflict with the provisions of this Act unless expressly authorized herein. Local authorities may, however, adopt additional traffic regulations which are not in conflict with the provisions of this Act." (I. R. S. 1955, Ch. 95½, § 122.)

"§ 26. Powers of local authorities. (a) The provisions of this Act shall not be deemed to prevent local authorities with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power from—

1. Regulating the standing or parking of vehicles;
2. Regulating traffic by means of police officers or traffic control signals;
3. Regulating or prohibiting processions or assemblages on the highways;
4. Designating particular highways as one way highways and requiring that all vehicles thereon be moved in one specific direction;
5. Regulating the speed of vehicles in public parks;
6. Designating any highway as a through highway and requiring that all vehicles stop before entering or crossing the same or designating any intersection as a stop intersection and requiring all vehicles to stop at one or more entrances to such intersections;
7. Restricting the use of highways as authorized in Article XVI of this Act;
8. Regulating or prohibiting the turning of vehicles or specified types of vehicles at intersections.

(b) No ordinance or regulation enacted under subdivisions (4), (5), (6), (7) or (8) of this section shall be effective until signs giving notice of such local traffic regulations are posted upon or at the entrances to the highway or part thereof affected as may be most appropriate." (I. R. S. 1955, Ch. 95½, § 123.)

Inasmuch as section 116 of the state law above set out requires only that the muffler shall be "in good working order and in constant operation" we are of the opinion that no further or different regulation may be imposed by the city. The enumeration of the eight fields of regulation designated in section 26 above set out, as remaining open to local authorities, has been held to operate as an exclusion of all other powers not therein mentioned. It is, therefore, our opinion that such an ordinance, if passed, would not stand.

TAX EXEMPTION FOR C. T. A.

(No. 11984—Mayor—J. F. G.—November 30, 1955.)

Referring to the request of Chicago Transit Board dated August 5, 1955, asking for relief from the Wheel Tax, Electricity Tax, Paving and Snow Removal Costs, it is our opinion that the only relief which the city council may grant is exemption from the Wheel Tax.

In an opinion rendered to the City Collector on February 7, 1948, we held that CTA is not exempt from the wheel tax under the present ordinance.

The so-called "wheel tax" is payable by virtue of Chapter 29 of the Municipal Code which, as stated by the chairman of the Chicago Transit Board, exempts "vehicles owned or operated by the city of Chicago, the Chicago public library, the United States government, American Red Cross and the municipal tuberculosis sanitarium" (Section 29-15).

The State of Illinois and all its political subdivisions, municipal corporations and other governmental agencies may be considered as a separate class subject to tax legislation, and the city council may include CTA vehicles by amendment to Section 29-15 exempting all such governmental agencies in general terms without specifying each of them.

As to the compensation provision in the franchise ordinance of Commonwealth Edison Company, or the proposed tax on persons engaged in the business of selling electricity, control of passing such obligations on to consumers is in the Illinois Commerce Commission. The Commission is not permitted to give any preference to any consumer. The City of Chicago and all other governmental agencies as consumers are required to pay their respective share of the burden of all municipal, state and federal taxes imposed on public utilities to afford them a reasonable net profit after taxes.

The provisions for payment of paving and snow removal costs are contained in Section 10, Paragraph K (1) and Section 12, Paragraph B of the CTA ordinance. The grant of authority to use the streets of Chicago for local transportation of passengers is subject to the provisions for the payment of the costs referred to and the ordinance was approved by popular vote, as provided by Section 11 of the Metropolitan Transit Authority Act.

Section 23-28.1 of the Cities and Villages Act provides that the city may grant to public authorities, for local transportation, the right to construct and operate facilities upon the streets and other public places upon condition that such grant shall be submitted for approval or adoption by the electors. It is expressly provided that after any ordinance prescribing terms, conditions and limitations of such grant becomes effective, *extensions and additions to such local transportation facilities may be authorized by ordinance with or without provisions for referendum*. A similar limitation is contained in Exhibit A of the CTA ordinance, as follows:

"Consent, permission and authority for the use by the CTA of additional streets, alleys, public ways and public grounds within the city may be granted to the grantee by ordinance of the City Council from time to time without referendum as provided by law."

From the foregoing it is obvious that the provisions relating to the payment of paving and snow removal costs can be changed only by an ordinance subject to approval by popular vote.

WOODEN ELEVATED COACHES

(No. 12096—Alderman, 47th Ward—W. H. S.—December 17, 1956.)

On December 10, 1956 we received your letter dated December 6, 1956 which reads as follows:

"I have this day introduced an amendment to Section 188-6 of the Municipal Code of Chicago by adding a new subsection, known as subsection (1), as follows:

'(1) No structural portion of any elevated railroad car operated within said city shall be constructed of wood.'

During the debate on this amendment to our City Code several suggested that inasmuch as the City of Chicago surrendered all of its power to the Chicago Transit Authority upon the passage of the ordinance granting them their powers and privileges, the City Council is powerless to act in this matter.

However, the City of Chicago has never relinquished its police powers over the public ways upon which the Chicago Transit Authority operates. Furthermore, we have great power to legislate to promote public safety. I am wondering why Section 188-6 of the Municipal Code of Chicago was not repealed at the time of the passage of the Municipal Transit Ordinance granting powers to the Chicago Transit Authority when so many other sections of Chapter 188 of the Municipal Code of Chicago were repealed.

I would greatly appreciate an early opinion as to the legality of this amendment."

Your question, in our opinion, is answered by the Supreme Court of Illinois in the case of *The People of the State of Illinois, Appellant v. Chicago Transit Authority et al., Appellees.—The People ex rel. William J. Tuohy, State's Attorney, Appellant v. Chicago Transit Authority, et al., Appellees*, 392 Ill. 77 (opinion filed November 21, 1945).

The court said (at page 81):

"The questions arising in this case involve the validity of an act entitled 'An Act to create a municipal corporation for public ownership and operation of a transportation system in the metropolitan area of Cook County,' to be known as the 'Metropolitan Transit Authority Act'. (Ill. Rev. Stat. 1945, chapter 111½, pars. 301 *et seq.*) The corporation created by this act will be hereinafter referred to as the Authority. * * * This act was passed by the Sixty-fourth General Assembly and was approved by the Governor on April 12, 1945, with an emergency clause. There was also passed by the same General Assembly an act to amend certain sections of article 23 of the Revised Cities and Villages Act, under which amendment the city council of the City of Chicago passed an ordinance authorizing and granting to the Authority *exclusive right to acquire, construct, maintain and operate facilities for local transportation within the city of Chicago for the term of fifty years and thereafter until* (at page 82) *terminated*, and granting the use of the streets, city-owned subways, and public places therefor. The Chicago Park District Act and the other acts relating to this matter, but unnecessary to discuss here, were also amended.

The Transit Authority Act requires that, before the Authority can assume any of the power granted it, the adoption of the act be sub-

mitted to a vote of the people. Under the act and the city ordinance so providing, the question of the adoption of the act was submitted to a vote of the people on June 4, 1945, the date of the judicial election, and the act was adopted. Thereafter the appointments of members of the Chicago Transit Board, the governing body, were made by the Governor and by the mayor of Chicago, in accordance with the terms and provisions of the 'Transit Authority Act.'

The court discussed and ruled on the numerous objections concerning the validity of the act which had been urged by the appellants. It is not necessary for the purposes of this opinion to discuss all of them.

We call your attention however to pages 83 *et seq.* of the opinion as follows:

"Chief among the questions presented,—the answer to which provides the solution of numerous other questions raised on this record—is *whether the act creates a municipal corporation*. Counsel for appellant contends that a municipal corporation has not been created and therefore it is not entitled to exercise the rights, privileges, functions and authority, and to enjoy the exemptions of a municipal corporation; * * * (at page 84). They argue that the Authority has no municipal powers, does not govern, was not created for that purpose, and has no political rights, and they point out as evidence of that fact the provision of the statute that the (at page 85) Authority has no power to levy taxes. *They say that it is given no police powers*, and, being an involuntary corporation, was not created with the view to engage in commerce.

On the other hand, appellees argue that the legislative intent to create a municipal corporation is clearly shown by the act. They point to section 3 providing that the territory described is by the act created 'a political subdivision, body politic and municipal corporation'; that there is no express constitutional prohibition against the creation of a municipal corporation such as created here. They argue that the Authority was created for a public municipal purpose: that the operation of an adequate, modern transportation system is well calculated to attain the objects of State police power, i.e., the promotion of public comfort, health, safety and general welfare. They say that since common-carrier transportation has always been deemed to be affected with the public interest, it follows that if the police power of the State may regulate the existence and right to operate a public transportation system, it can, by the same power, create a public municipal corporation to furnish adequate transportation, and the fact that the Authority is endowed with large proprietary powers and does not have the taxing power, do not militate against the existence of the basic public purpose of providing for the general welfare of the territory involved. They say that this is the end and aim of the creation of the Authority which gives it its public municipal character.

This court has frequently called attention to the fact that the constitution of this State is not a grant of power to the General Assembly but is a limitation upon its power. All legislative power is vested in the General Assembly subject to the restrictions contained in the constitution. (Citing cases.)

(at page 87) "There can be little doubt that it was the intention of the General Assembly to organize the Authority for a municipal public purpose, i.e., to operate an adequate and modern transportation system suitable and adapted to the needs of the municipalities served by the Authority. This court has recognized the importance and necessity of adequate and modern transportation in the metropolitan area of Chicago (*People v. City of Chicago*, 349 Ill. 304).

(at page 89) The need for adequate transportation in that area is not only evident but pressing. Much of the equipment in use has become old and defective. It appears impossible to finance the rehabilitation of existing facilities either by the city or by private funds. Faced with this situation, the General Assembly concluded that it was a case where the assistance of the State was imperative to protect the health, safety and general welfare of the public in that area, and it is not for the courts to say that a public purpose does not exist or that the General Assembly may not properly find that it does.

Counsel for appellant argue, however, that a distinction exists between giving such powers to a city, and attempting to give them to the Authority as a municipal corporation. We are not impressed with the distinction sought to be drawn. The purpose of municipal corporations generally is to carry into effect some power which the State itself may, but cannot conveniently, exercise, and we see no distinction between the power of the State to establish a municipality or a municipal corporation to carry out a public purpose and the vesting of such power in a municipality already in existence. The transportation system provided is to be operated over the public highways of the area included. In the absence of constitutional limitation *the control of the General Assembly over public highways is, absolute and it may give jurisdiction over them to such agencies as it may see fit, and it may change the control of them at its pleasure.* (Citing cases.)

* * * * *

(at page 90)

Nor can it be said that the Authority is not vested with governmental powers. By section 28 of the act, the board shall establish and maintain a system of civil service and a retirement system. By section 30 it is to fix rates, fares and charges for transportation. By section 23 all its ordinances, proceedings and documents are declared to be public records. These and other provisions of like nature show that certain governmental powers are vested in the Authority. *As already indicated many of the objections raised to the act are based on the contention that the Authority is not and cannot be a municipal corporation. Since we hold a contrary view, it will be unnecessary to consider questions based upon the hypothesis that the Authority is not a municipal corporation.*" (Emphasis supplied.)

In our opinion the exclusive right to control the operation of the facilities for local transportation owned by it is in the Chicago Transit Authority, a municipal corporation, and the amendment introduced by you on December 6, 1956, if passed by the City Council, would be invalid.

Because of the unfortunate accident of recent date in which a wooden car was involved we have set out in appendices, hereto attached, quotations from the ordinance of April 23, 1945 pertaining to the "*Modernization of Transit System*".

APPENDIX A.

EXCERPTS FROM THE ORDINANCE PASSED APRIL 23, 1945 AND APPROVED BY THE PEOPLE AT THE ELECTION HELD JUNE 4, 1945.

"Preamble

" * * * Whereas, for the better accommodation of and more economical use by the public it is desirable that the street railway, rapid transit motor coach facilities and services of the city be combined, improved, extended and supplemented, and operated in conjunction with the Initial System of Subways owned by the City of Chicago now partially completed and in operation and the remainder being constructed by the City of Chicago and with certain extensions of the Initial System of Subways also to be constructed or ac-

quired and owned by the City, so as to provide a comprehensive unified local transportation system owned and operated by a single municipal corporation, the major portion of which system is to be located within or the major portion of the service of which system is to be supplied to the inhabitants of the city of Chicago, and which system is to be used mainly for the transportation of persons in the city of Chicago and in adjacent and suburban territory within the metropolitan area; and

Whereas, It is proposed by this ordinance to grant consent, permission and the exclusive right and authority to Chicago Transit Authority, a municipal corporation created by the laws of the State of Illinois for public ownership and operation of a transportation system in the metropolitan area of Cook County, for the creation, establishment, maintenance and operation of such comprehensive unified local transportation system and to fix the definite terms and conditions of such consent, permission and authority;

* * * * *

Section 3, Modernization of Transit System.

Paragraph A. Initial Extensions, Additions and Improvements.

The Grantee and the City agree that an adequate and modern system of local transportation suitable and adapted to the needs of the city of Chicago requires an expenditure estimated, at present day costs, at \$125,000,000. for extensions, additions, improvements, betterments, and facilities, the scope of which is indicated in Exhibit B hereto attached, which may be modified from time to time if found desirable. The Grantee shall construct, reconstruct, or acquire and install extensions, additions, and improvements to and facilities for the Transit System under any of the provisions of this ordinance upon the finding of the Transit Board that such extensions, additions, improvements, betterments and facilities are required by public convenience and necessity, and upon its approval of provision for the expenditure therefor out of available cash, or in case cash is not available then by loan, sale of bonds, or certificates or otherwise.

The Grantee shall devote to the modernization of the Transit System, as provided in this paragraph A and in Exhibit B, all cash in the renewal and depreciation funds and in the special renewal and equipment funds of the existing companies, if acquired, but not including any cash in damage reserve funds of said companies. Nothing in this ordinance contained shall impair the right of the Grantee to use any other cash or funds which may be required for working capital, reasonable reserves for injuries and damages, pension and annuity reserves and current renewals; for interest and principal and sinking fund payments on equipment and modernization loans and on fixed interest obligations and for such reserve or reserves as are necessary to pay charges on its fixed interest obligations pursuant to any ordinance or trust indenture adopted by the Board.

The Grantee shall take all steps which it may lawfully take to procure the additional cash or credit necessary to comply with the requirements of this ordinance relative to the construction, reconstruction or acquisition and installation of the extensions, additions, improvements, betterments, equipment and facilities specified in Exhibit B, subject to limitations specified in this paragraph A, provided that the obligation of the Grantee with respect to the construction, reconstruction or acquisition and installation of such extensions, additions, improvements, equipment and facilities and those required by any other provisions of this ordinance and to provide such additional cash or credit therefor may be deferred, in whole or in part, if circumstances beyond the control of the Grantee arise which prevent it from obtaining such additional cash or credit except upon unreasonable or exorbitant terms or conditions.

The ordinances and resolutions of the Transit Board passed in compliance with the requirements of this section with respect to such extensions,

additions, improvements, betterments, equipment and facilities, shall be enforced in the manner prescribed by law or by this ordinance, and the obligations of the Grantee to comply with such ordinances and resolutions and with the requirements of the preceding paragraph of this section shall be subject to and extended as to time by delays or interruptions occasioned by acts of God, war and acts of the public enemy, inability to obtain labor or the delivery of materials or equipment, unavoidable accidents, labor strikes or orders and judgments of any court of competent jurisdiction entered in any suit brought without connivance of the Grantee."

* * * * *

"EXHIBIT B".

* * * * *

"Rapid Transit Cars."

"For the effective operation of the rapid transit system of the Transit System as modernized, the Grantee shall undertake, subject to the provisions of this ordinance, to construct or acquire and install and operate such number of new cars of modern design, constructed of steel or other comparable material, as will provide a passenger carrying capacity equivalent to not less than 1,000 of the steel cars now being operated by Chicago Rapid Transit Company.

Reconstruct where necessary the existing four hundred fifty-five (455) cars of steel construction for subway operation, and equip all existing air door cars with multiple unit door control."

APPENDIX B.

EXCERPTS FROM THE PEOPLE OF THE STATE OF ILLINOIS, APPELLANT V. THE CITY OF CHICAGO *et al.*, APPELLEES.—ELIZABETH M. BASS *et al.*, APPELLANTS V. THE CITY OF CHICAGO, APPELLEES, 349 Ill. 304 (OPINION FILED JULY 26, 1932) WHICH HELD VALID THE ORDINANCE PASSED MAY 19, 1930 GRANTING A TERMINABLE PERMIT TO THE CHICAGO LOCAL TRANSPORTATION COMPANY.

The court said (at page 312) :

"Since 1859, when the first street railway company was organized for operation in Chicago, there have been eighteen such companies in operation there. By means of foreclosure sales, leases, consolidations and otherwise, the properties of these companies were acquired by the four street railway companies now in operation. The properties of these companies have been operated as a unit since 1913 under a 'unification ordinance' passed in that year, and those properties are now in the hands of receivers appointed by the District Court of the United States for the Northern District of Illinois, Eastern Division, and are being operated under the supervision of the receivers through an operating agency known as Chicago Surface Lines board of operation. The street franchises of these companies were granted by the city by ordinance in 1907 and they expired February 1, 1927. Since that time the surface street cars have been operated by virtue of temporary licenses or permits from the city, which by their terms were to expire January 31, 1932. These street car lines comprise more than 1000 miles of single track and 4000 street cars. During the fiscal year ending January 31, 1930, they carried almost 900,000,000 revenue passengers in the city. The number of rides furnished daily was 4,500,000, and of this number upwards of one-half of the passengers were carried within two periods aggregating five hours of each twenty-four hours. The surface lines carried more than seventy-seven per cent of the total number of pas-

sengers carried by all the local transportation companies in the city. A decree for the sale of all the properties and franchises of these companies has been entered by the Federal Court in the receivership proceedings.

Commencing in 1892 there were four distinct systems of elevated lines operating in the city of Chicago and its suburbs. These were operated upon elevated structures. The lines of these four systems have since been consolidated and are operated electrically as a single system under the ownership and management of the Chicago Rapid Transit Company. This company's system comprises 230 miles of single track and almost 2000 cars. In 1929 it carried almost 20,000,000 passengers, ninety-four per cent of whom were carried within the city of Chicago, and such traffic represented about seventeen per cent of the total of all passenger traffic in the city. The ordinance permits or franchises for operation of the elevated lines expire at different times but all within a comparatively short time in the future. The record shows that the future operation of these lines for the service of the public is dependent upon the adoption of some constructive program for a comprehensive unified local transportation system like the system contemplated by the Comprehensive Traction ordinance.

Prior to the passage of the ordinance of 1930 the Chicago Local Transportation Company was attempted to be organized as a corporation under the 1929 Corporation Act Amendment. It is named in the ordinance as grantee of the right to operate a unified local transportation system. One of the questions raised is whether this company is a corporation. The parties agree that if the 1929 Corporation Act Amendment is valid the Chicago Local Transportation Company is a validly organized corporation and the individuals named as respondents in the information are properly acting as officers thereof.

The agreed facts show that the ordinance of 1930 is the result of years of study and struggle to find a solution of the local transportation problem in Chicago and its vicinity—a problem which seems to have become more difficult each year. It is asserted that the welfare and future development of Chicago and its metropolitan area depend to a large extent on the adoption of such a program. The ordinance of 1930 was approved by the people of Chicago at an election held July 1, 1930, more than eighty-five per cent of the total votes cast being in favor of its adoption.

Substantially the same questions are involved in the *Bass* case (No. 21019), which has been consolidated with the *quo warranto* case. The *Bass* case is a bill filed by Elizabeth M. Bass and others, as tax-payers, against the city and its officers, to enjoin expenditure of the city's funds under the Comprehensive Traction ordinance of 1930. The trial court entered a decree dismissing the bill for want of equity. The bill alleges the invalidity of the legislation of 1929 and the ordinance of 1930 upon various grounds. Suffice it to say that the complainants in the *Bass* case seek to raise substantially the same questions as are raised by the People in the *quo warranto* case, and the parties in the *Bass* case have entered into a stipulation in the trial court agreeing upon substantially the same facts as are stated in the agreed case which was entered into in the *quo warranto* case. Because of the similarity, if not identity, of the questions raised in the two cases, the cases are considered together."

Note: In *The People v. Chicago Transit Authority*, 392 Ill. 77, the court supplemented the above quoted matter as follows (at page 88):

"From the institution of equity receivership proceedings in 1926, involving Chicago railway companies, the record here shows many unsuccessful efforts to reorganize Chicago Surface Lines and Chicago

Rapid Transit Lines. Ordinances were passed providing for the merger of these lines. This ultimately failed. For more than fifty years various actions taken, both by private interests and by the city, in an effort to reorganize and procure an adequate transportation system, have all failed. It was found that the city was unable to take over these lines that sufficient private funds could not be procured. Different plans for reorganization were worked out for private operation of these lines but resulted in failure. Ordinances were passed only to meet with like fate. Without going into detail as to these many efforts and failures, some of which (at page 89) were set out in *People v. City of Chicago*, 349 Ill. 304, they presented to the General Assembly a situation unparalleled in the history of American cities.

The need for adequate transportation in that area is not only evident but pressing. Much of the equipment in use has become old and defective. It appears impossible to finance the rehabilitation of existing facilities either by the city or private funds. Faced with this situation, the General Assembly concluded that it was a case where the assistance of the State was imperative to protect the health, safety and general welfare of the public in that area, and it is not for the courts to say that a public purpose does not exist or that the General Assembly may not properly find that it does."

APPENDIX C.

Chicago Transit Authority Equipment Modernization Progress.

(Received from Mr. Virgil E. Gunlock December 12, 1956)

"In its comparatively brief history, including operation of surface lines and rapid transit properties of Chicago since October, 1947, Chicago Transit Authority has brought well toward completion Chicago's greatest program of local transit modernization. Under this program CTA has invested or committed for modern cars and buses more than \$90,000,000 in addition to \$16,400,000 for the Chicago Motor Coach properties. In 38 years preceding the start of CTA's modernization program the two predecessor companies—Chicago Surface Lines and Chicago Rapid Transit Companies—had invested \$46,000,000 for new rolling stock.

For this investment CTA has purchased 4,036 modern cars and buses, most of which are now in regular daily service.

Surface system equipment purchased under this program—3,362 units—include 900 gasoline and diesel motor buses, 600 streamlined streetcars, 561 trolley buses and 1,301 odorless propane-fueled motor buses. Of these 3,362 units, all except 219 have been delivered, 120 more are expected by the year-end or shortly thereafter and the remainder by March 1, 1957. Included among the 600 streetcars are 470 cars that have been or are being refabricated into modern rapid transit cars. In addition CTA acquired 595 buses, virtually all modern, with the purchase of the Chicago Motor Coach properties.

The surface lines operations, which provide service within three blocks of approximately 99% of Chicago's population, are now virtually all by modern equipment. Only two streetcar lines remain in operation in the city, both of which are served by modern buses on week-ends and holidays. It is expected that buses will replace streetcars on these lines by early 1958. CTA has retired from service since October, 1947, 2,824 streetcars.

The modernization of CTA's rapid transit equipment is also well advanced. The entire service on the heavily ridden North-South line and the Milwaukee-Dearborn subway line is provided by modern equipment. Also, all of the non-rush period service and a substantial part of the rush period service is by modern equipment on the Ravenswood, Lake Street, Garfield Park and Douglas Park lines.

The procedure of fabricating 470 of these rapid transit cars using certain components of streetcars results in a saving of about \$20,000 per car.

In this program, CTA has retired from service 889 old rapid transit cars. There are only 218 of these units now scheduled for service, mostly in the rush hours, and all except 70 of these units are expected to be retired by August 1, 1957. The 70 units necessary to retire the remainder of these old cars are expected to be ordered in 1957 for delivery early in 1958, unless this purchase can be advanced by the necessary funds being provided in the immediate future by other public agencies.

In 1945, when CTA was incorporated, the average age of surface lines equipment was 29.4 years and the average age of rapid transit equipment was 39.4 years. These average ages have been reduced to 7.6 years for surface lines equipment and 27.2 years for rapid transit equipment."

ELECTRICAL PERMIT REQUIRED

(No. 12288—Chief, Bureau of Electrical Inspection—E. W. P.—June 18, 1959.)

We have your letter of May 26, 1959, in which you request an opinion as to whether or not it is necessary for an electrical contractor to take out an electrical permit, pay the required fees and make the installation on C. T. A. controlled properties, in accordance with the Chicago Electrical Code. You advise that this is the practice when City owned or controlled properties require work to be done through an electrical contractor.

Section 86-11 defines "electrical contractor" to mean any person engaged in the business of installing or altering, by contract, electrical equipment for the utilization of electricity * * * not including radio apparatus or equipment for wireless reception of sounds and signals, conductors and other equipment installed for or by public utilities, including common carriers which are under the jurisdiction of the Illinois Commerce Commission, for use in their operation as public utilities.

The exclusive language in Section 86-11 pertains to common carriers under the jurisdiction of the Illinois Commerce Commission, and it is therefore our opinion, that in order to be exempted from the provisions of the Electrical Code, a common carrier must be under the jurisdiction of the Illinois Commerce Commission.

The C. T. A. is not under the jurisdiction of the Illinois Commerce Commission, and therefore it is our opinion, that electrical contractors who are employed to install or alter electrical equipment for the C. T. A. must obtain the required permit or permits and make electrical installations in accordance with the provisions of the Code, and must, of course, pay the required fees.

CHAPTER IX — PUBLIC WAYS

A. DEDICATION AND VACATION

VACATION OF A STREET

(No. 11892—Alderman, 36th Ward—J. C. M.—April 3, 1955.)

In your letter of September 15, 1954 you request an opinion concerning the closing as a thoroughfare of Mobile Avenue between Cortland Street and Armitage Avenue. We gather from your letter that you have in mind a permanent closing of this street.

Owners of property abutting on a street or alley and the public generally have a substantial interest in keeping it open as a thoroughfare. The cutting off of ingress and egress from abutting property would subject the municipality to an action in damages. We are advised that there is at least one commercial building located on Mobile Avenue that requires ingress and egress. Substantial damage might result from cutting off such access. However, under the law the City has a right to vacate public streets no longer useful or necessary for that public purpose and in accordance with the statutes of the State of Illinois (*People ex rel. Hill v. Eakin*, 383 Ill. 383). This is the usual manner in which a public highway lawfully may be permanently closed to the public. Even the closing of a public street in this manner may subject the City to substantial damages, depending upon the surrounding circumstances. If the owners of the abutting property consent to the vacation, the damages would be minimized.

Except in cases where the deed, or other instrument, dedicating a street has expressly provided for a specific devolution of the title thereto, upon a legal vacation the title to the land included in the street vests in the then owners of the land abutting thereon (Chap. 24, Section 69.12 Ill. Rev. Stats. 1953).

"A public highway laid out and established as such by the public authorities, or which has become a public highway by user, remains such until it is vacated by the public authorities in the manner prescribed by the statutes, or is abandoned by non-user on acquiring the legal right to another road, or where the necessity for another road has ceased to exist" (*C. & E. I. Ry. Co. v. Road Dist.*, 353 Ill. 160 at page 165).

In that case the court held that the Illinois Commerce Commission had no jurisdiction to enter an order to discontinue a railroad grade crossing in a public highway that was not vacated or abandoned. If the vacation of Mobile Avenue would eliminate the necessity for the grade crossing, the Illinois Commerce Commission, under the cited case, would have authority to abolish it.

Abandonment of a highway is not favored in law. In the last cited case the court held that even though the adjoining land owners fenced and cultivated a portion of the highway for a short period, there was no abandonment. A fence across a street constitutes a public nuisance and may be removed by injunction proceedings. Public ways must be kept free from obstructions (*McQuillin Mun. Corp.* (3rd Ed.) Vol. 10, p. 695).

Whether the City should be subjected to possible court action and damage is a matter for the City Council and not for this department to determine.

Aside from the closing of the street, it appears to us that the Traffic Department or the Committee on Traffic and Safety of the City Council might solve your problem without subjecting the City to possible law suits.

WATER MAINS IN VACATED STREET

(No. 11905—*Commissioner of Water and Sewers* —F. S.— May 12, 1955.)

Your letter of recent date requests an opinion on the right or power of the City to assess or charge the Chicago Park District for the costs of abandoning water mains and charge for the value of such water mains abandoned in City streets vacated in their favor.

The power of the City Council of the City of Chicago to vacate any street or alley or part thereof, is granted by Illinois Statute (Chapter 24, Article 69, Section 11, Ill. Rev. Stat. 1953). Under the Statute, compensation for such vacation shall be equal to the benefits which will accrue by reason of that vacation. The Statute gives broad powers to the municipality and is declaratory of what the public policy of the State is in such matters.

The Illinois Supreme Court in *People v. City of Chicago*, 321 Ill., 466, held that as the legislature, in the exercise of its power to vacate or discontinue streets or highways, can act through subordinate agencies it may confer such power on municipalities, and when so authorized a City Council may, without any judicial determination, order the vacation of a street by proceeding in accordance with the Statute authorizing the same, and in such case the only question that can be considered upon objection to the vacation is whether the action is within the terms of the grant.

In *People v. City of Chicago*, *supra*, where the provision of the ordinance making the same conditional upon the payment by the beneficiary of the vacation to the City, a sum as compensation for the benefits which would accrue, the court held that in vacating an alley pursuant to the amendment of 1923 to the act for the vacation of streets and alleys, the action of the Council in making the ordinance conditional upon the payment of compensation by the party seeking such vacation, is not inconsistent with the statute.

The Water Fund of the City of Chicago derives its authority from the provisions of the Special Charter of 1863 by which the legislature granted to the City the right to own and operate its own Water Works (Private Laws, 1863, pages 138 and 139).

Under the Act of April 10, 1872, Article 12, providing for the incorporation of Cities and Villages throughout the State (Section 166, Chapter 24, Ill. Rev. Stat. 1953), the Supreme Court in *People v. Hummel*, 215 Ill. 77 (1905), construing the aforementioned Statute, held that Sections 13 and 32 of the Act of 1863, revising the Special Charter of the City of Chicago and requiring the City Treasurer to keep money received from water-loan bonds and water rents in a separate fund and prohibiting its use for any other purpose than that for which it was received, were not abrogated by the City's adoption of the General Incorporate Act of 1872, but are in full force and effect.

It is therefore, our opinion that the policy of the Bureau of Water and Sewers to charge the costs of abandoning water mains and to charge for the value of such water mains abandoned to whomever requests the abandonment is entirely proper and such expense must be reimbursed to the Water Fund.

STREET IMPROVEMENT ESCROW

(No. 12229—Chairman, Committee on Local Industries—R. N.—
May 28, 1958.)

We have considered the question submitted by your committee in connection with the legality of a proposed ordinance which would require the applicant for a permit to erect a building on a lot abutting an unimproved street to deposit with the city treasurer a sum of money sufficient to pay the lot's proportionate share of the cost of paying the street.

In our opinion there is no legal basis for the imposition of such a condition precedent to the issuance of a building permit. It is an established rule of law that the city may exercise only such powers as are expressly granted to it or are necessarily incident to the exercise of the powers so granted. The city's power over streets as enumerated in the Revised Cities and Villages Act, contain the following grant of power:

Sec. 23-8. "To vacate, lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks
* * *

Article 84 of the Cities and Villages Act relates to the making of local improvements. Section 84-1 contains the following general authorization governing the making of such improvements:

"The corporate authorities of the specified municipalities shall have power to make such local improvements as are authorized by law, by special assessment or special taxation of contiguous property, or by general taxation, or otherwise, as they shall prescribe by ordinance."

The sections of Article 84 which follow set out in detail the procedure to be followed in each case. Nowhere is there any provision which makes it mandatory upon the city to provide for the improvement of an unimproved street except upon specified conditions, the cost in any case to be based on the cost per unit for the property benefited, as established by order of the court in the proceeding involved. Only in the manner prescribed may the abutting property be burdened with the cost of an improvement.

This department has held that a municipality cannot compel a subdivider to install paving and public utilities (Opinions of the Corporation Counsel, XXI, p. 188, no. 10419, and authorities therein cited). It would logically follow that the municipality cannot compel individual property owners to install an improvement, and therefore, could not indirectly so burden an individual property owner. It might be that the improvement would not be made for years; it might well be that it would never be made. From a practical standpoint there would be no way of determining its possible cost if and when undertaken, and no justification for indefinitely tying up funds of an applicant for a building permit. At such time as a contemplated improvement becomes a reality, the law sets out the manner in which the improvement may be accomplished and the costs thereof defrayed.

"OPEN UP FOR PUBLIC USE"

(No. 12275—P. P.—T. A. D.—April 10, 1959.)

You recently wrote us regarding a provision which appears in Vacation Ordinances passed by the City Council, wherein the Ordinance provides in Section 2, in part as follows:

"The vacation herein provided for is made upon the express condition that within ninety (90) days after the passage of this

Ordinance (a named person) shall dedicate or cause to be dedicated to the public and opened up for the public use as an alley (a described piece of property)."

Your inquiry as to just what is meant by the requirement of the Vacation Ordinance that a property owner shall open up for public use the property dedicated for a public alley, and you want to know what has to be done to meet the requirement for opening up for public use.

In commenting on what constitutes a part of a street, it is stated in McQuillin on Municipal Corporations, Third Edition, Volume 10, Page 583, as follows:

"To constitute a way, street or public way within the jurisdiction of the public authorities, its recognition or establishment as such must distinctly appear, and the acts alleged to constitute an opening must be unequivocal. Mere improvement of a street is not always sufficient. Acquisition of land for a street by condemnation, dedication, or otherwise, is to be distinguished from the act of opening up or laying out the street."

The same writer, at page 585, of the same work, further states:

"Land though owned by the City in fee simple, does not acquire the status of a street until it is not only defined and laid out by survey, but also actually opened by work."

This Obiter Dictum is taken from 413 Ill. 196, *City of Jacksonville v. Padgett*.

From the foregoing, we are of the opinion that before issuing a Guarantee Policy to an abutting owner of a vacated way, you should determine that conditions in the Vacation Ordinance have been complied with.

We might further add that when an Ordinance vacating a part of a street, or alley, requiring the dedication of another street, or alley, it is done for the express purpose of providing ingress and egress to the other owners in the area proposed to be vacated.

REPOSSESSION OF VACATED STREET

(No. 12357—Chairman, Committee on Local Industries, Streets and Alleys—T. A. D.—September 27, 1960.)

You recently informed us that a meeting of the City Council held on September 9, 1960, a petition was referred to your Committee protesting the passage on May 27, 1960, of an ordinance vacating parts of West Byron Street lying between North Ottawa and North Oriole Avenues, for reasons outlined in said petition.

You have advised us further that the vacation ordinance hereinabove referred to was accepted, the compensation of \$10,397.48 was fully paid on August 29, 1960, and maps and plats have been recorded with the Recorder of Deeds of Cook County as Document No. 17946954, thus indicating complete compliance with said ordinance of vacation.

In response to your inquiry as to what, if anything, the City Council can do in this matter, we reiterate our opinion rendered on November 27, 1936, and appearing in Volume XIX of the Opinions of the Corporation Counsel and Assistants on pages 226 to 228 inclusive, in which we stated in a situation involving like circumstances that "the City cannot repossess itself of a vacated street by repealing the vacation ordinance if that ordinance has

gone into effect, but must either secure a dedication of the street by the owner or exercise its power of eminent domain."

This principle was affirmed by the Illinois Supreme Court, Volume 404, page 58, in a decision rendered September 22, 1949, entitled "*People ex rel. v. City of Mount Vernon*" which held that a repealing ordinance would not have the effect of reinvesting the City with an easement in the vacated street, where the vacation was originally in the public interest and for a consideration paid by the owner of the property on both sides of the street.

It is therefore our opinion that in the light of the foregoing, the City Council cannot legally adopt an ordinance to repeal the vacation ordinance referred to herein.

B. USE OF STREETS, ALLEYS AND SIDEWALKS

VAULT UNDER A STREET

(No. 11811—Commissioner of Streets and Sanitation—M. I. W.—May 12, 1954.)

In your letter of March 5 you state that a building at the northwest corner of Jefferson Street and Washington Boulevard, originally erected by the Chicago Surface Lines has recently been sold; that at the time it was erected, a vault was built which extended under the sidewalk on the west side of Jefferson Street just north of Washington Boulevard, and also under the roadway for a distance of about eight feet; that the new owners contemplate abandoning that part of the vault which is under sidewalk space, filling it in and building a new sidewalk, but do not intend to do anything about the part that extends under the roadway, contending that it is the City's responsibility to fill in this space.

You request our opinion as to whether responsibility for the sub street space rests with the new owners of the building or the City.

We have checked with the Bureau of Compensation who advise us that they have no record of any permit ever having been granted to maintain this vault. A check of the special ordinances of the City likewise revealed no specific grant of authority to create and maintain this vault. We understand that the building was originally constructed for use as a power house for cable cars.

In the absence of any records by way of specific permit or particular ordinance relating to this property we assume that the vault was originally constructed under the terms of the franchise ordinance which first granted to the West Chicago Street Railway Company authority to operate cable cars on the City streets. Our research on this point discloses that on March 30, 1888, the City Council enacted an ordinance which in Section 2 thereof provided that the company

"* * * may for the purpose of a cable road, make all needful and convenient trenches, excavations and sewer connections * * *".

Assuming the vault to have been constructed under this grant of power, tracing possible responsibility for restoration of the vault through the subsequent tangled history of the lease and assignment of West Chicago's lines to the Chicago Union Traction Company (June 1, 1899), the appointment

of receivers for Chicago Union Traction Company by the United States Circuit Court (April 22, 1903), the lease to the Chicago Railways Company (January 29, 1908) and the appointment of receivers for said Company (December 15, 1926) and then to the unified operation of the Chicago Surface Lines and finally the creation of the Chicago Transit Authority, demonstrates the tenuous grounds on which any attempt by the City to fix this responsibility on any contemporary interest would rest. We know of no theory that would impose this liability on the present owners and have centered our consideration on possible liability on the part of the Chicago Transit Authority. Examination of the factors involved has led us to conclude that any effort in that direction would lead to legal complexities of so uncertain a nature as to render further consideration of an attempt to fix Transit Authority responsibility in this case completely impractical.

WIDENING OF STREETS

(No. 11830—*Commissioner of Streets and Sanitation—H. A. C.—June 19, 1954.*)

You have advised that on October 28, 1953, the City Council granted permission to Wieboldt Stores, Inc., to widen the street at 1521-43 W. Henderson Street and 1520-42 W. School Street in accordance with drawings attached to your letter. You referred to Section 33-13.1 of the Municipal Code of Chicago which provides:

"The curb on each side of the street in each block shall be aligned at a uniform distance from the center line of the vehicular roadway in said block. There shall be no variation from the established curb lines in existing streets, except at street intersections where such deviation may be authorized by ordinance when necessary to remove traffic hazards, and in streets which are redesigned as 'cul-de-sacs' (short dead-end streets with vehicular turning areas at their ends)."

and further direct our attention to the fact that the ordered street widenings are not at the intersection nor do they extend for the entire block.

You request that we render opinions on five questions.

Your first question is, "Are we correct in assuming that Section 33-13.1 requires all street widenings, other than at intersections, when necessary to remove traffic hazards, to extend the entire block?" We are of the opinion that said Section 33-13.1 of the Municipal Code of the City of Chicago does require all street widenings other than at intersections to extend the entire block.

Your second question is, "Are we correct in our assumption that the ordered street widening is a violation of Section 33-13.1 of the Municipal Code?" Until it has been repealed, suspended or modified by proper proceedings, Section 33-13.1 is the controlling ordinance with regard to aligning of curbs in the City of Chicago. An ordinance has been defined as the designation for a local law of a municipal corporation, duly enacted by the proper authorities, prescribing general, uniform and permanent rules of conduct, relating to the corporate affairs of the municipality (Volume 2, McQuillin Municipal Corporations, Section 662). An ordinance cannot be amended, repealed or suspended by an order or resolution, or other act by a council of less dignity than the ordinance itself (Volume 2, McQuillin Municipal Corporations, Section 867). We have rendered numerous opinions in the past to the effect that an ordinance cannot be amended or repealed or suspended by an order or a resolution of the City Council (Volume 18, Opinions of Corporation Counsel, p. 90, Opinion No. 8372, and again at p.

456, Opinion No. 7198, and Volume 20, p. 164, Opinion No. 9889). The City Council in its discretion may properly amend Section 33-13.1 of the Municipal Code and if the amendment is in proper form, you, as well as other city officials, would be bound to act in accordance with the amendment. On October 28, 1953 (C. J. p. 5980) the City Council passed the following order:

"ORDERED, That the Commissioner of Streets and Sanitation be and he is hereby authorized and directed to give permission to the Wieboldt Foundation to set back the curbing a depth of 8 feet for a distance of 200 feet in front of the premises known as Nos. 1520-1542 W. School Street and Nos. 1521-1543 W. Henderson Street."

We are of the opinion that the order is of no force or effect being an attempt to vary by an order the terms of an existing ordinance, which as above stated cannot be suspended, repealed or amended by an order. We are, therefore, of the opinion that the ordered street widening is a violation of Section 33-13.1 of the Municipal Code of Chicago.

Your third question is, "Does the ordinance passed October 28, 1953, page 5980 take precedence over the provisions of Section 33-13.1 of the Municipal Code?" As above indicated, the matter passed by the City Council on October 28, 1953 (C. J. p. 5980), was an order and not an ordinance and we are of the opinion that it does not suspend, repeal or amend Section 33-13.1 of the Municipal Code of Chicago and does not take precedence over that section.

Your fourth question is, "Is the Commissioner of Streets and Sanitation required to issue a permit for the said street widening in accordance with the ordinance passed October 28, 1953?" And your fifth question is, "Should the Commissioner of Streets and Sanitation refuse to issue a permit for said street widening under the provisions of Section 33-13.1 of the Municipal Code?" Although the Commissioner of Streets and Sanitation, being only a ministerial officer of the municipality generally has no discretion in matters of this nature, *People ex rel. v. Solomon*, 54 Ill. 39 (1870), where the County Clerk sought to justify failure to comply with an order of mandamus on ground that, acting upon legal advice, he treated the law as unconstitutional, the court said:

"To the law every man owes homage, 'the very least as needing its care, the greatest as not exempted from its power.' To allow a ministerial officer to decide upon the validity of a law, would be subversive of the great objects and purposes of government, for if one such officer may assume infallibility, all other like officers may do the same, and thus an end be put to civil government, one of whose cardinal principles is, subjection to the laws."

Later cases have adhered to this principle of law. *Fahey v. City of Bloomington*, 268 Ill. 386 (1915) at page 389:

"* * *. The town clerk is a ministerial officer, and in causing the ballots to be printed he acts in a ministerial capacity * * *. It is not his province to determine the constitutionality of any act of the legislature or refuse to observe it. * * *"

In *Village of Dolton v. James Harma*, 327 Ill. App. 107 (1945) at page 125, it was stated:

"* * * that we are impressed with a contention of defendants, very earnestly advanced, that the Village Treasurer in the instant suit was a ministerial officer; that he was bound to follow the ordinances of the Village and the laws of Illinois; that he had no right to question the constitutionality of any Act of the general assembly; that a public official, so far as ministerial acts are concerned, is not liable to account for acts he performed in good faith under a statute that was declared unconstitutional after the acts had been performed. It would be, in

our judgment, a serious reflection upon justice if the law did not support defendants' contention. However, the law fully supports defendants' contention. (See *Fergus v. Brady*, 277 Ill. 272; *Fahey v. City of Bloomington*, 268 Ill. 386, 389; *People v. Solomon*, 54 Ill. 39, 46.) It would unduly extend this already lengthy opinion to quote what our Supreme court has said upon this subject."

We are of the opinion that the code requires such refusal in this instance and you should refuse the permit.

SEPARATE MASS TRANSIT VEHICLE LANE

(No. 11850—Chairman, Chicago Street Traffic Commission—M. I. W.
—September 16, 1954.)

In a letter dated May 18, former Commissioner Gunlock, in his capacity as Chairman of the Chicago Street Traffic Commission, stated that the Commission was considering a proposal to create separate lanes for mass transit vehicles on city streets; that Washington Street has been designated as a trial run street to determine the feasibility of such a program. Our opinion was requested as to the legality of the creation of separate lanes for mass transit vehicles. Section 134 of The Uniform Act Regulating Traffic on Highways provides in paragraph (C) as follows:

"Local authorities with respect to highways under their jurisdiction may also by ordinance or resolution, prohibit the operation of trucks or other commercial vehicles, or may impose limitations as to the weight thereof, on designated highways, which prohibitions and limitations shall be designated by appropriate signs placed on such highways." Chap. 95½, Par. 231 (C), Ill. Rev. Stat. 1953.

The greater power to prohibit the use of streets by "commercial vehicles" would by a common principle of law include the lesser power to prohibit operation on a part of the street while permitting operation on another part. Thus in the case of *Cicero Lumber Company v. Town of Cicero*, 176 Ill. 9 (1898) the court said at p. 24:

"The power to vacate or discontinue a street, qualified in the manner thus stated, necessarily involves the power to change the use of the street. The greater power of absolutely vacating necessarily includes the lesser power of regulating or restraining. If therefore the legislature had the power to confer upon the town of Cicero the authority to vacate one of its streets, it certainly had the power to limit the use of a street to a particular purpose benefiting all the public, and not exclusively shared by any class of the citizens."

In the specific case of vehicles of Chicago Transit Authority, the right to grant use of the streets to vehicles of the Authority, vested in the City under section 23-28.1 of the Revised Cities and Villages Act, obviously contains the lesser power to grant use of only part of a street.

There would, therefore, seem to be little question as to the right to restrict mass transit vehicles to a single lane.

The principal problem raised by this proposal revolves around the right of the City to exclude all traffic other than mass transit from the lane designated for buses and thus deny the motoring public the right to use a part of the public way.

Article 23 of the Revised Cities and Villages Act grants certain powers to the corporate authorities of municipalities, among which are the power

to vacate, lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve streets and sidewalks (Ill. Rev. Stat. 1953, Chap. 24, par. 23-8), the power to regulate the use of streets (Ill. Rev. Stat. 1953, Chap. 24, par. 23-10), and the power to regulate traffic upon the streets (Ill. Rev. Stat. 1953, Chap. 24, par. 23-27).

Municipalities hold their streets in trust for the public use and benefit and cannot grant away the public rights or grant their exclusive use to private individuals or corporations. *Village of Madison v. Alton, G. & St. L. Traction Co.*, 235 Ill. 346 (1908); *Sears v. City of Chicago*, 247 Ill. 204 (1910); *Ligare v. City of Chicago*, 139 Ill. 46 (1891).

This limitation of the general law was given careful expression in the Metropolitan Transit Authority Act, creating the Chicago Transit Authority, section 11 of which reads in part as follows:

"The Authority shall have the right, *but not exclusive of the public right*, to use any public road, street or other public way in the metropolitan area * * *". Ill. Rev. Stat. 1953, Chap. 111 2/3, par. 311 (emphasis added).

The amendment to the Revised Cities and Villages Act passed at the same time in authorizing the City to grant the use of streets to the Authority contained a similar condition:

"Such right may be granted for any duration of time and may be exclusive, subject to unexpired franchise ordinances, *but shall not be exclusive of the public right in any of the streets and public places.*" Ill. Rev. Stat. 1953, Chap. 24, par. 23-28.1 (emphasis added).

The question posed by the program you describe is whether the designation of a lane for mass transit vehicles would in effect constitute a grant, exclusive of the public right and in violation of the public trust in which streets are held and thus beyond the authority of the City.

It has been repeatedly held that although the primary and paramount object in establishing streets and highways is for the purpose of public travel, and the public and individuals can not be rightfully deprived of such use, the right to such use is not absolute and unqualified. *City of Elmhurst v. Buettgen*, 394 Ill. 248 (1946); *Elia v. Adams Express Co.*, 300 Ill. 340 (1921).

Thus in the *Adams Express Company* case the court in speaking of this right said:

"The right may be limited and controlled by the State, or by a municipality under its authority derived from the State, in the exercise of its police power, whenever necessary to provide for and promote the safety, peace, health, morals, and general welfare of the people, and is subject to such reasonable and impartial regulations adopted pursuant to this power as are calculated to secure to the general public the largest practical benefit from the enjoyment of the easement and to provide for their safety while using it."

The designation of particular portions of a public way for traffic of a particular character, and as a corollary, prohibiting the use of a particular part of the public way to traffic of a particular class, is not without precedent in Illinois.

The City Council has ample power to designate portions of the street to be used by motor vehicles and other portions to be used by pedestrians. *City of Elmhurst v. Buettgen*, 394 Ill. 248 (1940); *Topliff v. City of Chicago*, 196 Ill. 215 (1902); *Kohlhof v. City of Chicago*, 192 Ill. 249 (1901); *City of Bloomington v. Bay*, 42 Ill. 503 (1867).

It has also been held proper and not in violation of the public trust to erect an elevated structure for railroad tracks upon a street even though the

structure to some extent obstructed the street and to a degree deprived the citizen of full and unrestricted use of the street. *Summerfield v. City of Chicago*, 197 Ill. 270 (1902).

In supporting its conclusion in the *Summerfield* case, the court reasoned as follows:

"The facilities of passage and of transit, the safety and convenience of the public, should be controlling factors in the determination of the manner of effecting the elevation of the tracks. When these considerations demand the adoption of a plan of elevation which makes necessary the appropriation of portions of the street to the structure necessary to support the elevated tracks, such appropriation of the streets cannot be deemed an unlawful diversion of the street to the use of the railroad company. The public interest and the necessities of the public being conserved thereby, there would be no diversion of public property to private use." (P. 281.)

In the case of *Cicero Lumber Company v. Town of Cicero*, 176 Ill. 9 (1898), the court upheld the validity of an Act passed by the legislature which authorized corporate authorities to limit the use of certain streets to pleasure purposes and to prohibit the use of such streets by commercial vehicles. The legislation was attacked as depriving the public of a vested right to unlimited use of the streets so set apart. The court held that the Act set up a reasonable classification, was not discriminatory, and was not subject to the charge that the limitation imposed was not for the public good.

The principle of classification of different vehicles on a reasonable basis and the designation of different lanes on a given street for their use in the interest of public safety has been accepted without question. *Dixon v. Berger*, 64 Utah 195, 228 P. 744 (1924).

The test then to which this program must be put is whether a classification as between mass transit vehicles and other motor vehicles is reasonable and whether the limitations to be imposed constitute a reasonable regulation for the promotion of the public safety, convenience and welfare.

It is assumed that the traffic engineering studies and surveys which will presumably precede adoption of this plan will produce sufficient material to form the basis for a defense of the reasonableness of the plan. A showing that all traffic will be speeded up would be strongly persuasive in meeting the test of reasonableness. It seems apparent on the face of it that mass transit vehicles, not having to compete with regular traffic, will move at a swifter pace. Studies will presumably show what the effect may be on other traffic, flowing through one lane less than heretofore, but not having to contend with buses stopping at each intersection which move in and out of the flow of traffic.

An obvious word of caution would seem appropriate as to possible difficulties which may be encountered in sustaining the validity of an ordinance establishing such a division of lanes, should the resulting impact on general traffic, consist of a slowing down and further congestion of flow. The court faced with a situation where one large segment of the public, that riding mass transit vehicles, is speeded on its way at the obvious expense of the motoring public, might find that the action was unreasonable and arbitrary. Defense of this measure will be intertwined with pragmatic results, with the greatest hope of sustaining, resting on a showing of benefit to all segments of the public using the streets.

In the absence of a specific proposal as to the precise manner in which this plan may be implemented, we confine our opinion to the general proposition raised and conclude that the City Council may establish a single lane for mass transit vehicles and confine other traffic to the remaining lanes provided it will be possible to show this action to be for the benefit of the public at large.

Other problems which suggest themselves once a particular plan is adopted (such as the possible rights of abutting owners should a lane immediately adjacent to a sidewalk curb be selected) should be considered at the time you are ready with a more detailed proposal.

ABANDONED AUTOMOBILES

(No. 11910—Alderman, 2nd Ward—J. C. M.—June 2, 1955.)

In response to your inquiry as to possible legislation concerning the removal of junk automobiles that are parked on vacant lots in your Ward, please be advised that under Chapter 95 $\frac{1}{2}$, Section 42 of the Illinois Revised Statutes (1953) it is provided:

"Whenever any motor vehicle which has been abandoned, lost, stolen or unclaimed, shall come into possession or custody of any person in this state who shall not know the identity of the owner or other person legally entitled to the possession thereof, such person shall without delay wherever practicable, cause such motor vehicle delivered to a municipal officer charged with the keeping of abandoned, lost or unclaimed property when such property shall be found within a municipality and to the sheriff of the county when the same shall be found outside the corporate limits of a municipality."

Section 43 provides for the keeping of records.

Section 44 provides for notice to be given to the owner or other person legally entitled to the custody of any such motor vehicle.

Section 45 provides for the sale at public auction and notice of sale.

Section 47 provides for disposition of proceeds.

Under this statute it is our opinion that the Police Department has ample authority to go upon private premises and remove such abandoned or lost vehicles and tow them to the automobile pound and thereafter follow the statute as to disposition of the same.

LIGHTING ON A PRIVATE STREET

(No. 11914—Commissioner of Streets and Sanitation—B. M. K.—June 17, 1955.)

In your letter of recent date you requested our opinion concerning the obligation of the Bureau of Electricity to continue to maintain and operate lamps on Filmore Street between Menard and Central Avenues; Taylor Street between Waller and Central Avenues; the street parallel to and south of Chicago and Great Western Railroad between Menard and Central Avenues and Waller Avenue between Roosevelt Road and the street parallel to and south of the Chicago and Great Western Railroad.

A study of the data submitted in your letter verifies the fact that these streets are private streets, therefore:

1. It is not the obligation of the Bureau of Electricity to continue to maintain and operate the lamps on these private streets.

2. It is beyond the power of the City of Chicago to enter a contract for the maintenance of electrical equipment on private property and the resale of electricity to private parties without complying with the Municipal ownership of Public Utilities Act, Chapter 24, Section 49-1, Ill. Rev. Stat. 1953 which requires a referendum among other things.
3. The sale of our equipment to the Cicero Manufacturing district or to the individual members of this association coupled with their arrangements for direct purchase of electricity from the Edison Company would be one solution to this problem.
4. The removal of our equipment from this area, after permission to enter the private property had been granted, would be another solution.

WEST THOMAS STREET TUNNEL

(No. 11954—City Comptroller—J. F. G.—September 14, 1955.)

Reference is made to your letter of July 13, 1955, together with copy of letter from Commonwealth Edison Company dated July 12, 1955 regarding the above subject (Maintenance of Edison Co. tunnel under W. Thomas St.).

It appears that an ordinance was passed by the City Council on June 21, 1955 (C. J. p. 3702) granting permission to the Commonwealth Edison Company to maintain and use the tunnel under and across W. Thomas Street for a period of 10 years from and after July 22, 1945. The ordinance which was about to expire on July 21, 1955 was not then renewed nor has it been since renewed because, as claimed by Commonwealth Edison Company, this company's rights and privileges with respect to the maintenance of the tunnel are now covered by its franchise ordinance passed by the City Council on May 25, 1948.

Section 2 of the Edison franchise ordinance grants to the company the right, permission and authority to acquire, construct, lease, maintain, operate and remove its Utility Facilities in, upon, along, across, over and under Public Ways or Property as herein defined. The phrase "Utility Facilities" is defined to include structures and equipment used in or useful for the production, generation and transmission of electric energy. The phrase "Public Ways or Property" is defined to include all streets in the city.

We have caused a physical inspection to be made of the tunnel referred to and find that within the tunnel there are a series of pipes and conduits necessary for transfer of water, oil, compressed air, steam, electric energy and chemicals between the company's buildings on both sides of W. Thomas Street, which are within the definition of "Utility Facilities" covered by the grant in Section 2 of the Edison franchise ordinance.

In our opinion Commonwealth Edison Company has the right to maintain and operate these facilities for which the city is compensated under Section 10 of the franchise ordinance and that no further authority is required for the maintenance of the tunnel.

REMOVAL OF OBSTRUCTION IN ALLEY

(No. 11955—Chief Engineer—C. P. B.—September 14, 1955.)

We are in receipt of your letter of September 13, 1955, and the enclosed sketch of parking site No. 42.

In your letter you state that a porch on the building at 4732 Forrestville Avenue extends 7.5 feet into the alley at the rear of said premises thereby decreasing the width of said alley from 16 feet to 8.5 feet at that point. You further state that this operates as a traffic obstruction to the proposed parking facility No. 42.

You requested our advice as to action necessary to remove said obstruction, if possible.

City records reveal that the alley in question is a public alley having been dedicated as such in the original subdivision of April 19, 1904 and rededicated in a subdivision recorded December 18, 1915.

By the provisions of Section 1 of Chapter 34 of the Municipal Code of Chicago entitled "Structures On and Under Public Ways", obstructions of any and all kinds on public ways are prohibited unless specific authority for the construction or maintenance of such an obstruction is granted by council ordinance.

By Section 2 of said Chapter 34 the Commissioner of Public Works is authorized to order the owner or person in charge of such obstruction to remove the same and if such article or obstruction is not removed within six (6) hours after such notice, the Commissioner of Public Works may cause the obstruction to be removed, assessing the costs of such removal plus an amount not to exceed \$10.00 against the owner of the removed article or obstruction.

The procedures of Chapter 34 of the Municipal Code of Chicago should be followed with reference to the removal of the obstruction in the alley at 4732 Forrestville Avenue.

LIGHTING OF ALLEYS

(No. 11961—Alderman, 45th Ward—A. F. G.—October 4, 1955.)

As requested by telephone, we have prepared and forward herewith a draft of a proposed ordinance requiring an owner of property abutting a public alley, to place lights on his property and to maintain the same at his own expense for the purpose of lighting the alley. At the time you called we advised you that in our opinion such an ordinance would not be valid. A further study of the question convinces us that our first view of the validity of the proposed ordinance was correct.

The lighting of public highways, like the paving of streets and the building of sidewalks is a public improvement. In the case of *Larned v. City of Chicago*, 34 Ill. 203, it was held that the expense of grading and paving a street in front of a lot could not be assessed on the property in proportion to the frontage, but being a public improvement, it should be

assessed upon all the property benefited by the improvement, and in proportion to the benefit thus received as the Constitution requires such burdens to be ratably borne.

In *Gridley v. City of Bloomington*, 88 Ill. 554 (1878), an ordinance of the city of Bloomington imposed a fine upon anyone who shall permit snow to remain on the sidewalk abutting premises occupied or owned by him. In holding the ordinance invalid the Court said:

"The public had an easement over the street in front of the lot occupied and owned by defendant, and it makes no difference, so far as this decision is concerned, whether the fee of the street passed by the plat and dedication to the corporation, or whether it remained in the original proprietor. It is plain defendant has no other interest in the street in front of his property than any other citizen of the municipality. The same is true of the sidewalk. It is a part of the street set apart for the exclusive use of persons traveling on foot, and is as much under the control of the municipal government as the street itself. The owner of the adjacent lot is under no more obligation to keep the sidewalk free from obstructions, than he is the street in front of his premises. He may not himself obstruct either so as to impede travel on foot or in carriages. It will be conceded the citizen is not bound to keep the street in front of his premises free from snow or anything else that might impede travel; then, upon what principle can he be fined for not removing snow or other obstruction from the sidewalk in which he has no interest other than what he has in common with all other persons resident in the city?"

What the Court said here with respect to the public character of streets applies equally to alleys. Public alleys are laid out for the use and benefit of all the citizens and the owner of an adjacent lot is under no more obligation to keep the alley lighted, than he is to keep the street in front of his premises lighted, or keep the sidewalk free of obstructions.

From the foregoing, it is our opinion the attached ordinance would not stand the test of validity.

BENCHES ON PUBLIC PROPERTY

(No. 11975—Committee on Local Industries Streets and Alleys—
A. F. G.—October 26, 1955.)

With your letter of October 21, 1955, you attached a copy of an order introduced by Alderman Weber at the council meeting of October 14, 1955 and referred to your committee.

The order directed the Commissioner of Streets and Sanitation to grant permission to any person or firm who desires to install a bench at any intersection traversed by vehicles for the transportation of passengers. The permit would grant the right to place advertising signs on said benches upon the payment to the City of an annual fee of fifty dollars for the said privilege.

This office has been called on over the years to furnish opinions on similar proposals and has uniformly held that the City was without authority to permit the use of the streets for private purposes.

On May 10, 1949 we furnished to the city council an opinion on the precise question requested in your letter. This opinion is quite lengthy and is published in full in Volume 23 of the Opinions of the Corporation Counsel at page 692. In that opinion we held that an ordinance granting permission

to erect benches on public property and to place advertising matter on such benches would be invalid if passed. In another opinion published in the same volume of opinions at page 694 we held invalid a proposed ordinance permitting the use of parking meters for advertising purposes. In other opinions we have held that advertising on lamp posts, refuse cans and newspaper stands on public property was an illegal use of streets for private purposes.

It is our opinion the Weber order is invalid and should not be passed.

SIDEWALK REPAIR

(No. 12015—*Commissioner of Streets and Sanitation—B. M. K.—February 23, 1956.*)

On January 9, 1956 you requested information concerning property owners obligation to repair damaged sidewalks by hiring a licensed contractor or by special assessment.

An abutting property owner may voluntarily repair or construct a sidewalk under proper permit. The City may assess property for the cost of the construction or renewal of sidewalks under the provisions of the Sidewalk Act (Ill. Rev. Stat. 1955, Chap. 24, Sec. 63 *et seq.*) or the Local Improvements Act (Chap. 24, Sec. 84).

The method for constructing a new sidewalk under the Sidewalk Act is briefly as follows:—An ordinance is passed providing for the sidewalk desired and the property owner is given 30 days in which to construct it in accordance with the ordinance by hiring a licensed contractor. At the end of 30 days, if the property owner has not acted, the City may construct it and the cost is taxed against the lots by the City Clerk. This official thereupon issues a warrant to the City Collector who proceeds and collects the tax.

The Local Improvements Act (Chap. 24, Sec. 84) grants the City power to effect sidewalk improvements through special assessment procedures. Chapter 24, Section 84-7, modifies the necessity for public hearing in regard to proceedings for the laying, building, construction or renewal of a sidewalk.

Proceedings under the Sidewalk Act, through special taxation, or the Local Improvements Act, through special assessment, must initiate with the Board of Local Improvements.

ALLEY ENTRANCE TO PARKING LOT

(No. 12051—*Alderman, 40th Ward—A. F. G.—June 25, 1956.*)

Your letter of June 12, 1956, is as follows:

“I would like to know whether there is any prohibition in the City Ordinances against the use of an alley as a means of ingress and egress to a parking lot adjacent to a medical center which is provided for the use of patients of the medical center.

In the 40th Ward, there is a medical center which has a parking lot, but which has refused to provide a driveway from the street into the lot, since easy access can be had to the lot through the alley in the rear of the premises.

Neighbors who occupy residences on the same alley are objecting to the use of the alley by patients of the medical center to gain access to the parking lot.

I should appreciate your opinion as to whether there is anything that can be done to prevent such use of the alley."

We find no provision in the code prohibiting the use of an alley as a means of ingress and egress to private property abutting such alley.

Owners of property abutting a public street or alley have the right of ingress and egress to their property from such public ways, but aside from this right they have no greater interest in the street or alley than the rights they have in common with all other citizens.

The complaining neighbors use the alley as a means of entrance and exit to their property and we see no valid reason why they should object to its use by the patrons of the medical center for the same purpose.

In providing off-street parking facilities for their patrons the medical center is performing a public service by lessening parking congestion on the public street and should be commended rather than criticized for this contribution.

We doubt that legislation would be valid which permits one property owner to use the alley abutting his property as a means of entrance and exit thereto, and denies to another similarly situated, the same right.

PRIVATE BASIN IN SIDEWALK

(No. 12076—Deputy of Sewers—C. P. H.—September 18, 1956.)

We have your letter of September 12, 1956 wherein you state that the private rod-out basin, located in the sidewalk at the southeast corner of Indiana Avenue and 35th Street, is in need of a new cover. You claim that a cleaning crew from the 1st District of the Bureau of Sewers notified the tenant of the building at this location to advise the owner of the building of the dangerous condition of the lid.

Under the law the City has the primary duty to keep its sidewalks in proper condition for the use of the public, and a neglect to perform that duty, resulting in damage to a person exercising due care, will render it liable for damage sustained.

We, therefore, request that you order and direct the necessary action be taken to protect the public from the dangerous condition until the property owner restores the basin to a safe condition.

REMOVAL OF STREET OBSTRUCTIONS

(No. 12078—President, Board of Local Improvement—J. E. C.—September 21, 1956.)

In reply to your request for an opinion re obstruction to the construction or reconstruction of streets, alleys, and sidewalks, your attention is called to the Statutes of the State and Municipal Code.

Chapter 38, section 544 of the Ill. Rev. Statutes (1955) states, "It shall be unlawful for any person to wilfully or negligently obstruct, injure or

destroy or render impassable or dangerous for pedestrians or persons riding bicycles, any sidewalk or walk described in Section 1 of this Act.

"To obstruct on or encroach upon public highways, private ways, streets, alleys, commons, landing places, and ways to burying places is defined as a nuisance."

Chapter 38, Section 461, Ill. Rev. Statutes (1955).

The Municipal Code of the City of Chicago, Section 34-2 provides that the Commissioner of Public Works is authorized to order any article or thing whatsoever which may encumber or obstruct any public way within the City to be removed upon the giving of notice to the owner or persons in charge thereof to remove same.

Chapter 24, Section 23-11 states, "Generally a municipality has power to regulate use of its streets and alleys, to prevent and remove encroachments or obstructions on same, and to regulate laying of mains, erection of lights, and paving of streets, alleys or public places of City and to regulate and prevent use of streets, sidewalks and public property for various purposes, including telegraph poles."

City of Chicago Heights v. W. U. Tel. Co., 406 Ill. 428.

"City has duty to maintain its streets in such condition that public shall at all times have unobstructed use thereof."

City of Chicago v. Rhine, 363 Ill. 619.

In the *People v. Chicago City Railway Company*, 324 Ill. 618, the Court stated in so many words that the surface lines were required to relocate their tracks in 22nd Street between Archer and Michigan Avenues when the street was widened.

In the *People v. Wolper*, 350 Ill. 461, the Court held in this case gasoline pumps in the parkway of west of Lake Street constituted an unlawful obstruction upon the public street. The Court said, "If one may so obstruct the public highway, then may also another, resulting in serious hindrance to the use of the street by the public.

It is our opinion that any obstruction to the street or sidewalk or alley of the City may be removed after due notice has been sent to the property owner or to the one in charge.

SOLICITING TOWING BUSINESS

(No. 12131—Commissioner of Police—J. C. M.—July 1, 1957.)

Relative to your inquiry as to the legality of towing companies soliciting business on public highways where an accident has occurred, be advised that Section 36-49 of the Municipal Code of Chicago provides as follows:

"It shall be unlawful for any person including the owner of any business adjacent to or near the public way, either in person or through any agent or employee to stand upon, use or occupy the public ways to solicit the trade, custom or patronage for such business, or to interfere with or impede any pedestrian or any one in a vehicle on a public way, for purpose of soliciting business.

Any such soliciting of business on any public way is hereby declared to be a nuisance and the owner or proprietor of any such business who shall refuse or neglect to abate such nuisance after being notified in writing so to do by the commissioner of police, shall be fined not less than ten dollars nor more than two hundred dollars for each and every day he shall refuse or neglect to abate such nuisance.

Provided, nothing in this section shall be construed to include any business operated wholly or entirely upon any public way under or by virtue of a lawful permit or license issued therefor."

It appears that before an arrest could be made that you would have to notify the proprietors of the towing equipment, not regularly authorized by you to tow automobiles from the scene of an accident, that the practice of soliciting towing business upon the public highway is a nuisance and should be discontinued. This notification should be in writing. After giving such notice, the Department would be in a position to make an arrest.

SOLICITATION OF BUSINESS FROM DOORWAY

(No. 12150—P. P.—A. F. G.—August 8, 1957.)

Your letter of August 2, 1957 is as follows:

"Do you have on your books an ordinance which prohibits or drastically curtails the solicitation of passers-by by merchants standing in their doorways and calling out to pedestrians on the street in such a manner as to attract their attention to get them to stop and possibly to come into their store?"

If you do have such an ordinance, I would appreciate your sending it to me in the enclosed self-stamped, self-addressed envelope. If not, I will appreciate your informing me of the name of any city which might have such an ordinance."

We have no ordinance which prohibits solicitation of the kind described in your letter. Section 36-49 of the Municipal Code of Chicago (copy of which is enclosed), prohibits the solicitation of business on the public ways.

In 1934 we construed an ordinance of the City of Chicago, similar to the one enclosed, but which contained the following provision:

"It shall be unlawful for any person, while soliciting trade, or attempting to solicit trade, custom or patronage for any such business to interfere with or impede any pedestrian or passerby, or any one in a vehicle, or upon a public street or alley."

We held that solicitation of business on a public sidewalk, alley or street was in violation of the law, but that solicitation of business from a doorway or vestibule of a store, unless it interfered with the public use of the sidewalks was not in violation of the City code (Vol. 18 Opinions of the Corporation Counsel p. 679).

We are not familiar with the ordinances of other cities on this subject.

SNOW REMOVAL

(No. 12205—P. P.—E. W. P.—February 18, 1958.)

Honorable P. J. Cullerton has transmitted to us your recent letter reporting an accident that was caused by snow and ice on the sidewalks of the Northeast corner of Austin and Eddy Street, which property is vacant. You advised that your wife slipped and fell on the walk on January 7, 1958 causing her to be taken to the Northwest Hospital for X-rays. You ask whether

or not there is a law requiring a property owner to remove ice and snow from his walks.

In the leading case of *Gridley v. Bloomington* (88 Ill. 554), decided by the Supreme Court of Illinois, it was held that abutting property owners cannot be compelled to remove ice and snow because they do not hold the fee or title to the walks. For many years our Supreme Court has held that when freezing snow became hillocks and ridges, amounting to obstructions, it was the duty of the City to remove them and that, therefore, when accidents resulted from these formations the municipality was liable.

However, in a more recent case of *Strappelli v. The City of Chicago* (371 Ill. 72), our Supreme Court held that the City was not liable for such obstructions due to temporary weather conditions.

It is, therefore, our opinion that neither the abutting property owners nor the City of Chicago can be held liable for accidents due to the accumulation of snow and ice on the sidewalks.

SNOW REMOVAL—LICENSEE'S DUTY

(No. 12206—Commissioner of Police—C. N.—February 20, 1958.)

We have your letter of February 7, 1958, enclosing a memorandum from the Captain Commanding the 34th District, in which an opinion is requested as to whether Section 36-19 of the Municipal Code of Chicago, requiring abutting owners, lessees, occupants and tenants to remove snow and ice from sidewalks, can be enforced.

In the leading case of *Gridley v. Bloomington*, decided by the Supreme Court of Illinois in the 19th Century, it was held that abutting property owners cannot be compelled to remove snow and ice from sidewalks, because they do not hold the fee or title to the walks. The citations quoted in your Captain's memorandum show that our courts, in recent years, have invariably followed this rule.

It is apparent from the above that your police would be acting without proper power in issuing Court summonses to owners, residents or occupants of private dwellings for failure to clear sidewalks of snow and ice in front of such residences.

We note your concluding query as to whether the Police have any authority to issue Court summonses to operators of business concerns. Section 101-29.1 of the Municipal Code of Chicago sets forth that it shall be unlawful for any person licensed to engage in any business or occupation on premises abutting a public way for or in connection with his business or occupation to litter or to permit the accumulation of any paper, rubbish or refuse upon that portion of the public way abutting said premises or on and about that portion of the public way so used. This section provides that it shall also be the duty of the licensee to remove the snow and ice from the sidewalk in front of his premises. A fine not exceeding two hundred dollars is provided for violations.

The foregoing section should not be confused with Section 36-19 of the Code hereinabove discussed. The granting of a license is a privilege, not a right, and there is no sound legal reason for curtailing the power of the municipality to make reasonable regulations for the conduct of businesses by licensees.

CITY LIGHTS FOR PRIVATE STREET

(No. 12224—Alderman, 50th Ward—A. F. G.—May 15, 1958.)

We have your letter of April 21, 1958 which reads as follows:

"For the past several years the neighbors on Rosehill Drive have requested the new type city residential lights. The Bureau of Electricity advises me that they cannot place lights on private property. As you are aware, Rosehill Drive is a private drive owned by the Rosehill Cemetery. I have had several informal discussions with the principals at Rosehill Cemetery, and no favorable conclusion has been reached. I would like to suggest that negotiations be made with Rosehill Cemetery in an effort to have Rosehill Drive deeded to the city. If these negotiations are not successful, then other means should be developed to acquire this drive, so that these residents can have the advantages of street lights, police protection, etc.

If any City Council action is necessary, please prepare such orders or resolutions for submission to the Council."

If the managers of Rosehill Cemetery are unwilling to sell Rosehill Drive we know of no way the city can acquire that private drive. Rosehill Cemetery was incorporated by the State of Illinois on February 11, 1859. Section 4 of the Cemetery's charter is in part as follows:

"The said managers and their successors shall have authority to lay out and ornament, for cemetery purposes, such grounds as they may acquire as aforesaid; to make and have recorded in the recorder's office of Cook County a plat of such grounds and of such additions thereunto as they may make at any time; and the filing of such a plat for record shall operate as a legal vacation of any former plat or sub-division of the same, and of any roads, streets, or alleys, passing through the same; * * *" (Ill. Private & Public Laws, 1859, p. 38).

On November 30, 1891 the following document was filed and recorded in the office of the Recorder of Deeds of Cook County, as document number 1576184 and recorded in Book 54 Plats at p. 38, in accordance with said Section 4.

"State of Illinois,
County of Cook.

I hereby certify that I have surveyed and subdivided land situate and being a strip 78 feet wide running from the main entrance of Rosehill Cemetery Company east to Clark Street, belonging to the Rosehill Cemetery Company and used by them as a private Driveway and Roadway. Said subdivision to be known and designated as the Clark Street Entrance Roadway of said Cemetery. To be used only as a private roadway for the use of said Cemetery and as a part of the grounds of said Cemetery Company.

November 30, 1891

John Stephens,
Recorder."

Section 9 of the said charter is as follows:

"No roads or streets or other thoroughfare shall be laid out through any property selected and held by said cemetery company for burial purposes, without consent of the managers of the company; nor shall any of the lands so selected and held be condemned for right of way by any other corporation for any purpose whatever: Provided, that this section shall only apply to such lands as shall have been platted and recorded, as provided for in section four (4) of this act."

As this private drive was platted and recorded as provided in Section 4, it is immune from condemnation under the provisions of Section 9.

On September 24, 1925 we sent to the commissioner of gas and electricity the following opinion (Vol. 14, p. 329, Opinions of the Corporation Counsel):

"We have your letter of the 12th inst., in which you make inquiry as to the City's right and authority to install and maintain a lighting system in and upon private streets, particularly Beverly Glenn parkway, between 99th and 100th streets.

Under Section 1626 of The Chicago Municipal Code of 1922, among other enumerated powers, your department is charged with the management of municipal lighting. This section contains no reference to the places of installation or manner in which said municipal lighting shall be made operative. It is our opinion that if in your judgment a better lighting system could be made possible in certain localities within our corporate limits by the placing of electric light poles upon private property, with the consent of the owner of said property, it could be done.

Funds for street lighting purposes have lately been obtained through the issuance of bonds. The language of the ordinance passed by the City Council submitting the proposition of a bond issue to the electorate reads 'for the extension and rehabilitation of the street lighting system of the City of Chicago.' No reference here is made of the place or manner of installation.

These bonds are retired by the application of a portion of the taxes levied against owners of all property situated in the City of Chicago. It would be highly inequitable for the property owners in and along Beverly Glenn parkway to be assessed for the payment of their pro rata share of street lighting bond funds and then be obliged to install and maintain an independent lighting system. Particularly so, when there are no restrictions in the bond issue ordinances or the general ordinances prohibiting the installation of lighting facilities anywhere within the municipality where such installation would resolve into benefits for the whole of the municipality.

There being every indication of an unrestricted use of Beverly Glenn parkway as a public street for all intents and purposes, we see no legal reason why your department cannot extend its lighting facilities to include the same, conditioned of course, upon being granted express approval by the City Council."

If you can secure the consent of the cemetery management to the installation of a lighting system in Rosehill Drive you should introduce and have passed an order in the City Council directing the bureau of electricity to install its lighting system in that private street.

SIDEWALK REPAIRS

(No. 12235—P. P.—C. P. H.—June 20, 1958.)

We have your letter of June 13, 1958, wherein you ask certain questions with reference to the repair and maintenance of the City's sidewalks.

It is well established that the City is charged with the duty of keeping its sidewalks in a reasonably safe condition (*City of Elmhurst v. Buettgen*, 394 Ill. 248; 9 I. L. P. Secs. 491 and 493, and cases cited therein). It has also been repeatedly held that it is the duty of the City, and not that of abutting property owners, to keep its sidewalks in repair (*Burns v. Kunz*, 290 Ill. App. 278; *Hogan v. City of Chicago*, 168 Ill. 551; *City of Bloomington v. Bay*, 42 Ill. 503).

In answer to your first question, it is the responsibility of the City, and not that of the abutting property owners, to repair and maintain its sidewalks in a reasonably safe condition.

In answer to your second question, it is also the City's responsibility to restore any of its sidewalks to a reasonably safe condition which have been damaged by roots of trees in parkway areas.

We call your attention to the fact that the City, pursuant to powers granted to it by the Local Improvements Act and the Sidewalks Act, is embarking on a plan to replace sidewalks through special assessment and special taxation of contiguous property (Ill. Rev. Stats. 1957, Ch. 25, Art. 63, Secs. 63-1 to 63-8; Art. 84, Secs. 84-1 to 84.1-49; 20 OP. Corp. Coun. 304; 23 OP. Corp. Coun. 790).

SNOW REMOVAL BY ABUTTING OWNER

(No. 12267—P. P.—A. F. G.—January 22, 1959.)

Your letter of January 9, 1959 addressed to Mayor Daley has been referred to this office for consideration and reply. You request the mayor to use his influence with members of the legislature and the city council to enact legislation which would compel the owner of property abutting a public street to remove the snow from the sidewalk in front of his premises within 24 hours after a snowfall.

Even if the mayor were successful his efforts would be in vain, as there is ample legislation now on the statute books and in the city code, if it were valid, to accomplish your purpose. Section 23-20 of the "Revised Cities and Villages Act" now provides:

"Section 23-20. Sidewalks—Use of, Cleaning off snow.) To regulate the use of sidewalks, the construction, repair, and use of openings in sidewalks, and all vaults and structures thereunder; and to require the owner or occupant of any premises to keep the sidewalks abutting the premises free from snow and other obstructions."

Section 36-19 of the Municipal Code of Chicago is as follows:

"Every owner, lessee, tenant, occupant or other person having charge of any building or lot of ground in the city abutting upon any public way or public place shall remove the snow and ice from the sidewalk in front of such building or lot of ground."

Were it not for a number of adverse decisions by our Supreme Court the city's power would be ample. In these decisions the Supreme Court held that a municipality cannot compel a lot owner to keep snow and ice from the sidewalk abutting his premises. *Gridley v. City of Bloomington*, 88 Ill. 554; *City of Chicago v. O'Brien*, 111 Ill. 532; *City of Chicago v. Union Traction Co.*, 199 Ill. 259. In the last cited case, after quoting from the other cases, the court said:

"The doctrine of these cases is unquestionably sound * * *. The owner of property abutting on a street has no interest in the street of a city, as a street, other than that possessed by every other citizen. * * * The burden however of keeping the sidewalk or street clear of snow, ice or other accumulation is a public burden, and no obligation is imposed on the lot owner to perform that which it is the duty of the municipality as the representative of the public, to perform. The lot owner has no special right, benefit or interest in the street in front of his premises."

This office has written numerous opinions on this subject matter and in every case has followed the reasoning set out in these decisions.

SNOW REMOVAL BY ABUTTING OWNER

(No. 12268—P. P.—J. C. M.—January 27, 1959.)

In reply to your letter of January 26, 1959 relating to removal of snow from sidewalks, I call your attention to the decisions rendered in *Gridley v. City of Bloomington*, 88 Ill. 554, *City of Chicago v. O'Brien*, 111 Ill. 532, *City of Chicago v. Union Traction Co.*, 199 Ill. 259.

You will note that there is a statute on the books, Chapter 24, Section 23-20, which authorizes the municipalities to regulate the use of sidewalks "and to require the owner or occupant of any premises to keep the sidewalks abutting the premises free from snow and other obstructions". This law has been on the books since 1871 and was in force and effect at the time that the decision in *Gridley v. City of Bloomington*, *supra*, was rendered, although the Act was not therein mentioned. The decisions rendered in Illinois are apparently contrary to the weight of authority throughout the United States (See Dillon on Municipal Corporations, 5th ed., sec. 713). In the case of *Village of Carthage v. Frederick*, 122 N. Y. 268, the court of New York refused to follow the reasoning and decision rendered in the *Gridley v. Bloomington* case.

You will find in Smith-Hurd Illinois Annotated Statutes, Volume 24 under Section 23-320, notes which the author, after considering the citations that I have given above, made:

"These decisions appear to us as completely wrong, but how can a statute be made more plain? Perhaps, some time the Supreme Court can be persuaded to reverse itself."

In 1915, our office reviewed all these decisions and rendered an opinion, part of which is as follows:

"There will be noted that in all of these cases the court bases its rulings on the constitutional rights of the abutting owners and not on any question of delegation of power or the proper mode of the exercise of a power. It holds in each instance that the police power of the State does not include the power to compel abutting owners to remove snow and ice placed upon the public thoroughfares by natural causes."

C. ADVERTISING AND HANDBILLS

INSPECTION FEES ON ILLUMINATED SIGNS

(No. 11824—City Comptroller—A. F. G.—May 26, 1954.)

We have your letter of May 10, 1954 in which you say:

"Referring to section 58.1-12, provision E, paragraph 3, of the Municipal Code of Chicago, which concerns inspection fees for signboards and the illumination apparatus attached thereto, the following question has arisen:

Where there are multiple illuminated signboards on the one premises, does the minimum fee apply to each signboard, or can the one minimum fee apply to each signboard, or can the one minimum fee be applied to the several sign boards collectively."

You ask our opinion on the subject.

Section 58.1-12, provision E, paragraph 3 of the Municipal Code of Chicago reads as follows:

"3. Signboards—annual fees for inspection of signboards shall be computed on the area.

Up to 100 square feet	\$1.00
100 to 375 square feet.....	1.50
For each additional 375 square feet or fractional part thereof	1.50
In addition, annual inspection fees for illuminated signboards over private property, containing 25 nominal 50-watt or 50-volt ampere lamps or less shall be	4.00
For each additional 25 lamps	.15

If the lamps are other than 50-watt or 50-volt ampere, rating shall be based on the total connected load reduced to 50-volt ampere units and the above schedule of fees shall be applied.

In addition to the above fees for any signboard or illuminated signboard erected more than 18'0" above the average inside grade at front of building, add \$61.00 for the first 500 square feet or fractional part thereof, in area of one face, and 6½¢ per square foot for each additional square foot."

Chapter 58.1 of the Municipal Code of Chicago deals with Electric Signs and Signboards. Section 58.1-3 of that chapter reads as follows:

"58.1-3. Permit required.) It shall be unlawful to proceed with the erection, enlargement, alteration or rehang of any electric sign or signboard, unless a permit therefor shall have first been obtained from the Commissioner of Buildings."

The permit fees for electric signs and signboards are provided for in Section 58.1-12. Paragraph C of that section provides permit fees for signboards over public and private property shall be as follows:

"up to 150 square feet	2.50
151 to 225 square feet	4.00
226 to 375 square feet	6.00
For each additional square foot or fractional part thereof	6.00"

It is our opinion these permit fees are for each signboard. This view is strengthened by the paragraph following the fees quoted above. That paragraph reads:

"In addition to the above fees, for *any* signboard erected more than 18 feet above the average inside grade at front of building, add \$61.00 for the first 500 square feet or fractional part thereof in areas of one face and 6½ cents per square foot for each additional square foot."

It will be noted that there is a similar paragraph in Section 58.1-12 E. 3. above quoted. This indicates the intention of the city council that inspection fees for the structure of a signboard and the inspection fees for the inspection of the lamps on illuminated signboards shall apply to each signboard and not to all signboards collectively. This intention is further evidenced by an examination of the following sections of Chapter 58.1: Sections 58.1-29, 30, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42 and 43, which refer to "*any* signboard or illuminated signboard", "*such* signboard" and "*any* sign".

If the General Outdoor Company or any of the large signboard companies owned or leased a block of vacant land and erected thereon ten illuminated signboards they would be required under Chapter 58.1 to take out a permit and pay the permit fee for each signboard. That being so, *can we* not believe the council intended that the fees for the annual inspection of these signboards required by Section 58.1-35, should be assessed on each signboard separately rather than charging one inspection fee for the ten signboards collectively?

We believe that was the intention of the city council and are, therefore, of the opinion that where there are multiple illuminated signs on one premises, the minimum inspection fee applies to each and every signboard instead of a single minimum fee for all of signs collectively.

POLICE "COURTESY CARD"

(No. 12033—Commissioner of Police—J. P. M.—April 20, 1956.)

This will acknowledge your recent letter in which you request an opinion regarding the legality of a card which is being distributed by a dealer for what is claimed to be advertising purposes. The text of the card is as follows:

"OFFICIAL POLICE COURTESY CARD"

Entitles Bearer

M T. J. O'Connor

Park in the Loop—all Cab Stands—in front of Fire Houses or in front of Fire Plugs—private driveways and restricted areas. Also to exceed speed limits by schools, hospitals and insane institutions, on boulevards, while intoxicated, provided, he or her or it, can get behind the wheel unaided.

(Signed) J. J. O'Connor

Not Valid Unless Signed by High Commissioner

Not good on St. Patrick's Day, the 4th of July, Yom Kippur, Sundays, Saturdays, Weekdays, or Holidays.

STATE OF ILLINOIS"

From the contents in the letter of the distributor, quoted in your request for an opinion, the sender of the card admits they are for advertising purposes, and it would seem the use of the name "O'Connor", even though the initials are different than yours, might tend to deceive and lead the public into believing that the Commissioner of Police of the City of Chicago actually issued the card. From the letter quoted, the distributor of the card does nothing to discourage the impression that the Commissioner of Police signed the card.

Chapter 11-47 of the Municipal Code provides in part as follows:

"No person shall falsely assume or pretend to be a policeman or a member of the department of police of this city * * *."

Although this may be considered a borderline case, we may still assume that the distributor of the card by the use of the name "J. J. O'Connor", subjects himself to the provisions of Chapter 11-47 of the Municipal Code of Chicago.

ADVERTISING SPACE IN PARKING FACILITIES

(No. 12061—Commissioner of Streets and Sanitation—J. P. D.—
July 25, 1956.)

We have reviewed your letter of July 10, 1956, in which you request an opinion as to the legality of selling advertising space in the city-owned parking facilities.

The Illinois Revised Statutes 1955, Chapter 24 Sec. 52.1-1 par. c (Cities and Villages) states as follows:

"Any municipality is hereby authorized to enter into contracts dealing in any manner with the objects and purposes of this Article, including the leasing of space on, or in connection with, parking meters for advertising purposes. Any contract for such advertising shall prohibit any interference with traffic control, shall prohibit placing any advertising sign or device on parking meters that exceeds the dimensions of 8 by 12 inches and shall contain such other provisions as the corporate authorities deem necessary in the public interest. All revenues derived from any such contract shall be used exclusively for traffic regulation and maintenance of streets within the municipality."

and Chapter 24, Sec. 52.1-9 (Proprietary activities other than parking of motor vehicles unauthorized) states as follows:

"Except as otherwise provided in paragraph (c) of section 52.1-1 this Article shall not be construed as authorizing any municipality to engage in any proprietary activity at or with any such parking facilities other than the parking of motor vehicles."

It is our opinion that selling or leasing of space in city-owned parking facilities is a proprietary activity not authorized by Chapter 24, Section 52.1-1 par. c and under Chapter 24, Section 52.1-9 the city has no authority to engage in proprietary activity at or with any parking facilities except as provided in Chapter 24, Section 52.1-1 par. c.

Therefore it is our further opinion that it would not be legal to sell or lease advertising space in city-owned parking facilities.

LIABILITY FOR POSTING POLITICAL PLACARDS

(No. 12086—Subcommittee on Judiciary and State Legislation—
J. C. M.—November 14, 1956.)

We have given consideration to your letter of October 26, 1956 and Alderman Nicholas J. Bohling's letter of October 16, 1956 relative to the amendment to Section 36-30 of the Code proposed by Alderman Cilella, which amendment, we are advised, reads as follows:

"The posting or otherwise affixing in any manner of any of the aforementioned articles in violation of the provisions of this section shall be *prima facie* evidence that the person on whose behalf such articles are so posted or affixed is responsible therefor."

As the amendment is drawn, we are of the opinion that it would be held to be invalid.

The Supreme Court of Illinois has not passed upon the authority of a city council to legislate as to what facts constitute a *prima facie* violation of an ordinance. However, the court recognizes that the State legislature has power to enact legislation creating certain rules of evidence and what facts constitute a *prima facie* case providing it lays down some guide or test stating the facts to constitute such *prima facie* case (*Schireson v. Walsh*, 354 Ill. 40, 48). It is then for the courts to determine whether such facts have been proved. The legislature does not have the power to declare what shall be conclusive evidence of fact. The proposed ordinance must contain a provision that the alleged violator may show that he did not in fact violate the provisions of the ordinance.

The authority of municipalities to provide that certain facts shall constitute *prima facie* violation of an ordinance has been recognized by other States.

Chapter 24, Section 23-23 gives the municipality the power:

"To regulate and prohibit the exhibition or carrying of banners, signs, placards, advertisements or handbills on the sidewalks, streets or other municipal property."

Chapter 24, Section 23-105 gives the municipality the power:

"To pass and enforce all necessary police ordinances."

It is common knowledge that it is difficult to detect persons placing placards and the like on public property. We think it is a necessary presumption that the person, firm or corporation for whose benefit such placards are printed and distributed have knowledge of the fact and authorize the distribution thereof.

The situation is similar to the parking of an automobile on the street in violation of the Code and the issuance of a parking ticket. There is a presumption that the automobile was parked by the owner or one authorized by him.

We have redrafted the proposed amendment and transmit the same herewith.

BILLBOARDS ON PARKING FACILITIES

(No. 12128—Commissioner, Streets and Sanitation—D. N.—June 24, 1957.)

In your letter of May 10th, 1957, you request an opinion from this office on the question of whether or not the city may contract with the Briggs Outdoor Advertising Company for the operation of a large billboard sign through and under a lease on the extension of parking facility No. 1, located at 1-9 West Wacker Drive, recently acquired from the Downtown Parking Stations.

There is nothing in the Ordinance of September 18th, 1952 that authorizes the City of Chicago to make any leases of parking facility properties either real or personal and we are governed by Chapter 24, Section 52.1-1, paragraph 3 of the Illinois Revised Statutes-1955, which reads as follows:

"(c) Enter into contracts dealing in any manner with the objects and purposes of this Article, including the leasing of space on, or in connection with, parking meters for advertising purposes. Any contract for such advertising shall prohibit any interference with traffic control, shall prohibit placing any advertising sign or device on parking meters that exceeds the dimensions of 8 by 12 inches and shall contain such other provisions as the corporate authorities deem necessary in the public interest. All revenues derived from any such contract shall be used exclusively for traffic regulation and maintenance of streets within the municipality."

and Section 52.1-9 of said Chapter 24 which reads as follows:

"Proprietary activities other than parking of motor vehicles unauthorized. Except as otherwise provided in paragraph (c) of Section 52.1-1 this Article shall not be construed as authorizing any municipality to engage in any proprietary activity at or with any such parking facilities *other than the parking of motor vehicles*."

We are, therefore, of the opinion that the enabling legislation does not permit the City of Chicago to enter into any contract with the Briggs Outdoor Advertising Company for the maintenance of the billboard sign that they own on the parking facility No. 1, property located at 1-9 West Wacker Drive.

BILLBOARDS WITHIN 400 FEET OF EXPRESSWAY OR PARK

(No. 12175—City Zoning Administrator—E. W. P.—November 7, 1957.)

We are in receipt of your letter attaching copy of letter from Associated Sign Contractors, 737 W. Madison Street, Oak Park, Illinois, in which you ask an opinion as to the interpretation of Sections 8.9(4), 9.9(4) and 10.14(4) of the Chicago Zoning Ordinance.

Sections 8.9(4), 9.9(4) and 10.14(4) contain the prohibition relating to advertising signs within 400 feet of specified public parks and main roadways.

The definition of an advertising sign in the Ordinance Article 3, page 24A is a sign which directs attention to a business, commodity, service, or entertainment conducted, sold, or offered elsewhere than upon the premises where such sign is located, or to which it is affixed. The same Article on the same page defines a business sign as a sign which directs attention to a business or profession conducted or to a commodity, service, or entertainment sold or offered upon the premises where such sign is located, or to which it is affixed.

The rules governing the interpretation of the Zoning Ordinance, Sections 5.1(1) and 5.1(2) contained on page 34A provide as follows:

"(1) In their interpretation and application, the provisions of this comprehensive amendment shall be held to be the minimum requirements for the promotion of the public health, safety, morals and welfare.

"(2) Where the conditions by any provision of this comprehensive amendment upon the use of land or buildings or upon the bulk of buildings are either more restrictive or less restrictive than comparable conditions imposed by any other provision of this comprehensive amendment or of any other law, ordinance, resolution, rule or regulation of any kind, the regulations which are more restrictive (or which impose higher standards or requirements) shall govern."

Advertising signs are not permitted within 400 feet of specified parks or main roadways as more specifically set forth in the pertinent sections of the ordinance. Business signs which do not direct attention to a business, commodity, service or entertainment conducted, sold, or offered elsewhere than upon the premises where such sign is located or to which it is affixed, are permitted only when they direct attention to a business or profession conducted or to a specific commodity, service, or entertainment which is an integral part of the business or profession conducted on the premises. High and strict rules of standards and requirements according to the rules of interpretation in the ordinance must govern.

Section 5.1 contained in the rules of interpretation and application of the ordinance specifies that the provisions of the ordinance contain the *minimum* requirements for the promotion of public health, safety, morals and welfare. The ordinance, therefore, should always be interpreted and applied relating to signs so as to prevent obstructions of view in the public parks or on the main roadways when these obstructions would cause any traffic hazards. Any business sign even though it is confined to the business on the premises or the specific product sold or serviced therein that would cause any hazard should not be permitted. The prohibition of billboards and signs, as well as the regulations thereof, have been upheld generally in the Courts only on the broad ground of public welfare and protection and in order to justify our position in prohibiting advertising signs within the 400 feet of the designated areas, we must be strict in relation to the context and the location of business signs within the same area.

SIGNS ON PRIVATE VEHICLES

(No. 12198—Alderman, 14th Ward—J. C. M.—January 31, 1958.)

On January 8, 1958, you requested that we inform you if there is any legislation existing in the City of Chicago which would prohibit the posting of advertising panels on the sides of privately owned and operated trucks and other commercial vehicles, and further request if there is no such ordinance, that we advise you of the validity of an ordinance to effectuate that purpose.

We find no ordinance in the Code which prohibits the attaching of advertising signs on automobiles or other vehicles operating over the streets of the city. However, it is our opinion that the City Council has power to enact an ordinance which would prohibit such practice.

Section 23-23 of the Revised Cities and Villages Act grants power to the City Council "to regulate and prohibit the exhibition or carrying of banners, signs, placards, advertisements or handbills on the sidewalks, streets or other municipal property". The Chicago Transit Authority was given power under its franchise to display or permit advertising, other than political advertising on the front, rear and both sides of its vehicles, the displays to be limited in height to 21 inches and to vary in width between 27, 36 and 44 inches.

PLACARDS ON LIGHT POLES

(No. 12216—City Clerk—A. F. G.—April 23, 1958.)

Your letter of April 16, 1958 is as follows:

"The Chamber of Commerce of the Milwaukee Division Area has requested me to secure a permit for them to attach a metal frame fixture 22 inches by 28 inches to our city lamp posts into which fixture placards will be inserted to advertise the Mayor's Clean-Up Campaign and various charitable and civic undertakings at various times during the year.

Will you please advise me if this request can be complied with."

Chapter 36 of the Municipal Code of Chicago is entitled: "Use of Public Ways and Places." Section 36-30 of that chapter reads as follows:

"No person shall post, stick, stamp, tack, paint or otherwise fix, or cause the same to be done by any person, any notice, placard, bill, card, poster, advertisement or other device calculated to attract the attention of the public, to or upon any sidewalk, cross-walk, curb or curbstone, flagstone or any other portion or part of any public way, lamp post, electric light, telegraph, telephone or trolley line pole, hydrant, shade tree or tree-box, or upon the piers, columns, trusses, girders, railings, gates or other parts of any public bridge or viaduct, or upon any pole box or fixture of the fire alarm or police telegraph system, except such as may be required by the laws of the state and the ordinances of the city.

Any person violating any of the provisions of this section shall be fined not less than ten dollars nor more than two hundred dollars for each offense."

We know of no state law or ordinance of the city which requires the posting of notices on electric light poles. In the absence of such a requirement it is unlawful for any person to post notices of the kind enumerated in the foregoing section at any of the places named therein.

It is our opinion, therefore, that you have no authority nor has any other city official power to issue a permit to do that which is so clearly prohibited by the said section.

GASOLINE PUMP LIGHTS

(No. 12234—City Comptroller—A. F. G.—June 19, 1958.)

Your letter of June 13, 1958 is as follows:

"Under the general provisions of Section 86.1-1 of the Municipal Code, various gasoline stations have been charged an annual fee for the illuminated signs on the top of their gasoline pumps. These pumps are located on private property and do not come to the public property line at all and in many cases are far removed from the property line. The Bureau of Electrical Inspection is issuing annual warrants for collection for all these signs. They are paid generally by the smaller operators but are not being paid and have not been paid for many years by Standard Oil Company, Sinclair Oil Company and Shell Oil Company.

Will you kindly advise me whether or not the City may properly charge an annual electrical inspection fee for the illuminated globes on the top of gasoline pumps which are not located on City property."

It is our opinion the city may properly charge an annual inspection fee for illuminated globes on the top of gasoline pumps which are not located on city property. Gasoline pumps can only be located on private property (*People v. Wolper*, 350 Ill., 461 (1932)).

In 1947 we sent to the commissioner of buildings an opinion holding that pumps with glass box or globe on which is painted the name of the company or the type of product sold therein which are illuminated by electricity come within the definition of electric signs as quoted in that opinion. We enclose a copy of that opinion which is published in full in Vol. 22, Opinions of the Corporation Counsel at p. 473.

Chapter 58.1, Electric Signs and Signboards, which was the basis of the attached opinion is now, with some minor changes, Chapter 86.1 of the Code. Paragraph (a) of Section 86.1-2 (Definitions) reads as follows:

"(a) Illuminated signs shall be deemed to be signs constructed as follows: signs, all or any part of the letters or characters of which are made in an out-line of lamps or tubes; signs with painted, flushed or raised letters, or characters lighted by a lamp or lamps or tubes attached thereto; signs having a border of lamps or tubes attached thereto and reflecting light thereon; glass or plastic signs, whether lighted by electricity or other illuminant; signs with painted, flush or raised letters or characters illuminated by lamps or tubes placed for the purpose of projecting or reflecting light thereon; and signs having any electrical equipment attached thereto. Illumination of signboards may be from a source attached to the structure or a source removed."

We are of the opinion that this definition clearly applies to illuminated globes on the top of gasoline pumps regardless of where they are located, and the owner of the same is required to pay the inspection and other fees provided by the ordinance.

D. TRAFFIC AND PARKING REGULATIONS

MODIFICATION OF PRIMA FACIE SPEED LIMITS

(No. 11783—*Commissioner of Streets and Sanitation—M. I. W.—January 26, 1954.*)

We have your letter of December 3, in which you raise certain questions regarding the authority of the City of Chicago to modify prima facie speed limits as provided in the "Uniform Act Regulating Traffic on Highways," and on which you request our opinion.

Your questions and the answers thereto are as follows:

"1. The Illinois Department of Highways has indicated to this office that the following classes of streets are under the jurisdiction of the Department of Public Works and Buildings, State of Illinois and, therefore, the City of Chicago has no voice in the regulation of speeds or tonnage:

- (a) Arterial routes.
- (b) State aid routes.
- (c) State bond issue routes.
- (d) Federal aid routes.
- (e) Marked state routes.
- (f) Marked federal routes.

Is the above correct?"

Paragraph 292 of Chapter 121, Illinois Revised Statutes (1953) provides as follows:

"The system of State highways shall comprise the following roads:

(1) All *State aid roads* as defined in paragraph b, section 1 of Article I of 'An Act to revise the law in relation to roads and bridges' * * *

(2) All highways authorized to be constructed under 'An Act in relation to the construction by the State of Illinois of a State wide system of durable hard-surfaced roads upon public highways of the State * * *' approved June 22, 1917, * * * and all highways authorized to be constructed under (a like titled act) approved June 29, 1923 * * * and known as '*State bond issue roads*'.

(3) All highways constructed, or authorized to be constructed by the State and Federal governments, and known as '*Federal Aid Roads*' and

(4) All highways heretofore constructed under 'An Act in relation to the construction of durable hard-surfaced roads in cities, villages and towns and making an appropriation therefor' approved June 11, 1925.

(5) All *State highway extensions* in cities, towns and villages authorized by the provisions of sections 6a, 6b, 6c, 6d and 6e of this Act.

(6) All highways for which refunds have been made under the provisions of 'An Act providing for refunds to certain cities, towns and villages, on account of durable hard-surfaced pavement constructed within the corporate limits by such municipalities to complete or connect State Bond Issue Roads,' approved June 11, 1925.

(7) All belt-line routes authorized by the provision 6 of this Act.

(8) All secondary roads authorized by the provisions of section 11a of this Act.

(9) All highways hereafter added to and included within such system pursuant to this Act.

Such highways shall be known as 'State Highways' " (emphasis added).

Paragraph 297 of Chapter 121 reads in part as follows:

"The highways designated in this Act as state Highways shall be taken over from the several towns and road districts, and from the several cities, villages and incorporated towns, by the Department of Public Works and Buildings, as provided in said Acts, and those parts of said State Highways on which no durable hard-surfaced improvements have been started or completed under the provisions of the Acts designated in this Act may be taken over by the Department of Public Works and Buildings, in its discretion, as rapidly as the appropriations made for repairs, improvement and maintenance thereof permit, provided the Department shall first take over the State Bond Issue Roads * * * Whenever any part or portion of any highway which is a part of the State highway system and lies and is situated within the limits of any city, village or incorporated town is taken over, the Department of Public Works and Buildings *shall have exclusive jurisdiction* and control over only that part of such highway which the State has constructed or which the local authority has constructed and which has been taken over by the State, and for the maintenance of which the State is responsible * * * Whenever any city or village shall construct with a durable hard surface the remaining portion of a street, a part of which has been improved with a durable hard surface by the State, or taken over by it, then in that case the State shall have jurisdiction and control over only that portion of said street over which it did construct the durable hard surface or that part which it took from the city or village * * *" (emphasis added).

From the foregoing, it is clear that the Department of Public Works of the State of Illinois has exclusive jurisdiction over state aid routes, state bond issue routes, Federal aid routes and marked state routes by virtue of sections (1), (2), (3) and (5) of paragraph 292 of Chapter 121 cited above. Since the procedure for designating federally marked routes is carried on in a manner identical to that followed for marking state routes, it is our opinion that section (5) is broad enough to embrace such streets and give the state jurisdiction.

We are, however, unable to find any authority to justify a claim by the State that its jurisdiction extends to "arterial routes," enumerated in item (a) of your list. The only mention of "arterial" streets we have found in the statutes occurs in the Motor Fuel Tax Act where in providing for the allocation of Motor Fuel Tax funds to municipalities the second permitted use is granted for:

"The construction, reconstruction and maintenance of a system of arterial streets or thoroughfares (*other than State highways*) in the municipality as may be designated by the council or president and board of trustees and approved by the Department of Public Works and Buildings."

Section 10½ (2) Motor Fuel Tax Act, Par. 426½ (2), Chap. 120 Ill. Rev. Stat. (1953) (emphasis added).

Although provision is made for approval by the State Department of Public Works of projects undertaken by the city, "approval" of a project before moneys will be made available is scarcely synonymous with "jurisdiction." In fact the very language of the quoted section attests to the intention of the legislature as regards the matter of jurisdiction since the section is expressly limited to "streets or thoroughfares (*other than State highways*) in the municipality."

It is, therefore, our opinion that the fact that a street is part of Chicago's arterial system is not sufficient in and of itself to remove such street from local jurisdiction and place it under state jurisdiction.

In an opinion addressed to you on April 14, 1948 we wrote as follows:

"The City of Chicago under the provisions of Paragraph 23-10 and 23-27, Chapter 24, Illinois Revised Statutes (1947), has authority to enact and enforce an ordinance imposing restrictions as to weight of vehicles operated upon streets under its jurisdiction. (*City of Chicago v. Fahy*, 335 Ill. 584; *Ferguson Coal Co. v. Thompson*, 343 Ill. 20.) Such authority has been conferred upon the City by the legislature and its exercise is not conditioned upon the consent of the Department of Public Works and Buildings."

Section 50 of the Uniform Act Regulating Traffic on Highways reads in part as follows:

"* * * whenever the local authorities in cities exceeding 500,000 in population shall determine upon the basis of an engineering and traffic investigation that any *prima facie* speed upon any street under its jurisdiction, as hereinbefore set forth, is greater or less than is reasonable or safe under the conditions found to exist at any intersection or other place or upon any part of a street, said local authorities shall determine and declare a reasonable and safe *prima facie* speed limit thereat which shall be effective when appropriate signs giving notice thereof are erected * * *"

The authority given the State Department of Public Works to alter the *prima facie* speeds established by the legislature as found in section 49(d) of the U. A. R. T. is limited by that section to "any State Highway, under its jurisdiction."

It is, therefore, our opinion that the City has no power to alter speed or tonnage requirements on State aid, State bond issue, federal aid, marked state or marked federal routes, but retains power to effect modifications of such controls on so-called arterial routes as well as on other streets under its jurisdiction.

We have discussed this matter with several officials of the State highway division and questioned their assertion of control over this latter group of streets and being unable to point to any authority to sustain that position they expressed oral agreement with our view of this matter.

2. You inquire as to whether all streets other than those you listed in question 1 are under the jurisdiction of the City of Chicago for the pur-

poses of regulating speed and tonnage and you call our attention to the definition of Streets and Highways in section 12(a) of the U. A. R. T. which reads as follows :

"(a) *Street or highway.* The entire width between property lines of every way or place of whatever nature when any part thereof is open to use of the public as a matter of right, for purposes of vehicular traffic."

In discussing this question with Mr. Sorenson we understand that you have in mind certain streets which have been built to service a particular business or facility and your inquiry is directed toward whether such streets are public and, therefore, under the city's jurisdiction. Rather than attempt to answer in any generic fashion, we suggest that specific inquiries together with the special facts relating thereto be sent to us for individual consideration.

3. Your third question relates to streets under state jurisdiction and you ask whether it is necessary for the City Council to pass an ordinance in order to make changed prima facie speed limits or limitations of tonnage promulgated by the Department of Public Works and Buildings, effective for enforcement by Chicago police.

Section 49 of the U. A. R. T. vests the State Department of Public Works and Buildings with power to alter the prima facie speed limits of State highways under its jurisdiction and such limits are made effective by virtue of this section. Hence police officers under the general duty to enforce state laws are authorized to enforce such changed speed limits on State highways within the city, without any action by the city council.

We are informed by the traffic division of the Police Department that their practice is to charge all speeders with violation of the statute and not with violation of any ordinance. The above situation, therefore, poses no novel situation affecting police procedure which need concern us.

Sections 134(c) and 134(d) of the U. A. R. T. contain similar provisions with relation to tonnage and Chicago police, therefore, have power to enforce changed tonnage requirements in a like manner.

4. You inquire as to the necessity for the City Council to pass an ordinance in order to make changed prima facie speed limits effective for enforcement on streets under the jurisdiction of the city.

Section 50 of the U. A. R. T. quoted above gives the city council authority to determine upon the basis of an engineering and traffic investigation that the prima facie speed as set by statute is greater or less than is reasonable upon any street under the city's jurisdiction, and to declare a reasonable and safe prima facie speed limit. The city council has delegated that power to the commissioner of streets and sanitation in Section 27-40(b) of the Municipal Code of Chicago which reads as follows :

"Whenever the commissioner of streets and sanitation shall determine upon the basis of an engineering and traffic investigation that any prima facie speed upon any street as provided for in the state 'Uniform Act Regulating Traffic on Highways', other than those streets or parts of streets which are highways under the jurisdiction of the department of public works and buildings of the State of Illinois, is greater or less than is reasonable or safe under the conditions found to exist at any intersection or other place or upon any part of a street, said commissioner of streets and sanitation shall determine and declare a reasonable and safe prima facie speed limit thereat, subject to the concurrence of the Chicago street traffic commission, which shall be effective when appropriate signs giving notice thereof are erected at such intersection or other place or part of the street but in no instance shall the speed exceed forty-five miles per hour."

Assuming the validity of the above ordinance, it seems clear that the council intended to vest its authority in those best qualified to make the determinations involved, thus following the lead of the legislature in vesting a similar discretion upon the State Department of Public Works for speed changes on State highways without expressly requiring a specific legislative act to give effect to each of the multitude of changes which could conceivably be made under the statute. It is, therefore, our opinion that a specific ordinance is not necessary to give effect to such changes as you may make in compliance with the requirements of the statute and the ordinance.

5. In your final question you ask whether an ordinance passed by the City Council regulating speed is valid if passed without substantiation by a traffic engineering investigation.

Section 50 of the U. A. R. T. quoted above expressly preconditions modifications of prima facie speeds by local authorities "upon the basis of an engineering and traffic investigation."

It is, therefore, our opinion that an ordinance purporting to effect such a change would not be valid if not based on an engineering and traffic investigation.

OFF STREET PARKING PLOT PLAN DATA

(No. 11787—Alderman, 6th Ward—A. F. G.—February 15, 1954.)

You state in your letter of February 8, 1954 that the owner of a six apartment building desires to alter and increase the number of dwelling units in the building from six to twelve.

You cite many of the provisions of the new off-street parking ordinance which are applicable to buildings such as the one referred to above. You refer particularly to sub-paragraph 4 of section 4.1A, which is as follows:

"4. *Plot Plan Showing Location of Parking Area.* No application for a building permit for a new, enlarged, or altered structure or improvement or use shall be approved unless there is included with the plan for such structure or improvement or use a plot plan drawn to scale, showing the required off-street automobile parking facilities in accordance with the conditions specified herein; nor shall a permit be issued for the improvement of a parking area to serve as an accessory use to an existing building or buildings until a plot plan, drawn to scale, has been submitted in accordance with the provisions contained herein."

You then conclude that in the case of apartments to be converted or altered the owner must submit with his application for a permit a plot plan showing the required off-street parking facilities provided by the ordinance. You then ask how much and the extent of the detail information that must be set forth in the said plot plan. You ask specifically if the plot plan drawn to scale must contain the following information:

"1. The access drives which will make the parking area accessible from streets or alleys?

2. The number of, and layout of the vehicle parking places (eight feet by nineteen feet) to be included in the total parking area?

3. The layout and measurement of the aisles between the parked vehicles to accommodate traffic movements within the parking area?

4. A statement or designation of the construction material to be used for improving the surface of the parking area, and a statement of the intended depth of said surface material?

5. A statement or designation of the planned Screening and Landscaping to be used, including the height of such screening, around any of the sides of the parking area?"

It is our opinion that the plot plan should show the information contained in the foregoing items. We conferred with Mr. Kincaid's staff which prepared the ordinance and they concur in this opinion.

LOWER LEVEL OF WACKER DRIVE

(No. 11792—Commissioner of Streets and Sanitation—J. C. M.—March 3, 1954.)

In your letter of February 17, 1954, referring to the relighting of the lower level of WACKER DRIVE and the installation of parking meters in the north and south bays, you requested an opinion as to the parking of automobiles in some of those bays (1) at two levels by means of mechanical devices and (2) "the use of this space for parking for periods greater than three hours with such parking facilities available from early in the morning until after the theater at night."

We have examined drawings of the area involved, of the type of mechanical devices to be used and their proposed location and operation, and the proposed method of handling automobiles in and out of the parking areas. It is represented that the mechanical device with hydraulic hoists will park automobiles two high and four abreast. You advise us that the use of such mechanical device will not interfere with the free flow of traffic on any portion of the street used for such parking. It is further proposed that attendants will supervise the operations and parking fees will be charged at an hourly rate. We assume that such operations will be carried on by personnel of the City of Chicago and will not be leased to or contracted with private operators.

Under Chapter 24, par. 23-10, Illinois Revised Statutes (1953), the municipalities have the power to regulate the use of streets and other municipal property, and under Chapter 24, par. 23-27, to regulate traffic.

Interpreting the powers under Sections 23-10 and 23-27, the Supreme Court, in *City of Bloomington v. Werrick* (1942), 381 Ill. 347, in holding constitutional an ordinance providing for installing and maintaining parking meters on public ways, said that providing places for parking and imposing time limits on parking are necessary incidents to the regulation of traffic upon streets. It further said:—"Neither is the ordinance void for the reason that it appropriates for private use the portions of the street which support the standards on which the meters are placed. This is a public use, incident to the regulation of traffic upon streets, for which they were primarily designed." This decision was rendered several years prior to the enactment of Article 52.1 of the Cities and Villages Act which authorizes municipalities to provide parking facilities as a revenue measure as well as a traffic regulation.

In *City of Chicago v. McKinley* (1931), 344 Ill. 297, 305, the court held that parking may be regulated as to *time when, place where and length of time permitted*, and that it is the province of the City Council to decide in what streets or parts of streets, during what hours and for what length of limitation of the right to park or allow a vehicle to remain standing is

necessary to a proper regulation of traffic. "It is for the Council to determine what means should be adopted to remove the causes of congestion, and its determination of such means cannot be disturbed unless the means adopted are unreasonable."

Chapter 24, Article 52.1 Illinois Revised Statutes (1953) provides, in part, that any municipality is authorized to:

"(a) Acquire by purchase or otherwise, own, construct, equip, manage, control, erect, improve, extend, maintain and operate motor vehicle parking lot or lots, garage or garages, *parking meters and other revenue producing facilities necessary or incidental to the regulation, control and parking of motor vehicles, * * * as the corporate authorities may from time to time find the necessity therefor exists.*" (Italics ours.)

This act was held to be constitutional in *Poole v. City of Kankakee* (1950), 406 Ill. 521.

The problem posed by your letter is one of first impression. An examination of decisions in this and other states indicates that the courts recognize that automobile traffic upon public ways presents an acute public problem and the courts will not interfere with the modern and changing methods invoked by municipalities in an effort to solve this problem.

In *Poole v. City of Kankakee* (1950), 406 Ill. 521, referred to above, the attack was made upon municipal ordinances (1) that regulation of parking where a charge is made therefore allows a community to go into business in direct competition with private citizens and (2) that it benefits individuals rather than the community. There the court held:

"A public use means public usefulness, utility, advantage or benefit. It is not essential that the entire community or people of the State, or any political subdivision thereof, should be benefited or share in the use or enjoyment thereof. The use may be local or limited. It may be confined to a particular district and still be public * * *. It can no longer be doubted that the regulation of streets and traffic is in the interest of public health, safety, welfare, convenience and necessity, and thus for a public purpose. Undoubtedly the stopping or parking of vehicles along the street is a legitimate use of the streets, but it is a use which is subject to legislative control."

The court there considered the modern economy and way of life as being closely geared to the automobile, the narrow streets, the increase in the number of automobiles and was of the opinion that the problem is one of national significance.

In *Michigan Boulevard Bldg. Co. v. Chicago Park District* (1952), 412 Ill. 350, the legality of the Park District ordinances providing for the construction of underground garages under Grant Park and Michigan Avenue was involved. The court reaffirms its holdings in the *Bloomington* and *Kankakee* cases, and holds that the "proposed use is not an unlawful diversion of the use of Michigan Avenue from its dedicated purpose and is a lawful use of the subsurface in order to properly regulate and control traffic upon the surface of its streets."

In *Lowell v. City of Boston* (1948), 79 N. E. (2) 713, it was contemplated to build underground garages under the Boston Commons (public park) with entrances and exits upon the surface thereof. In sustaining a statute similar to ours, the court said (p. 729):

"The garage is an incident in a legislative plan designed to abate a public nuisance arising from serious traffic congestion due to the greatly increased use of motor vehicles and their parking in the public ways of the city. The garage is a method employed to accomplish the primary purpose of the statute."

In *Harrison County v. City of Marshall* (1952), 253 S. W. (2) 67, the court held that the City of Marshall could utilize the streets constituting a public square around the court house by marking off stalls for parking and installing parking meters. Of like import is the decision rendered in *Greenwood v. City of Washington* (1952), 102 N. E. (2) 642.

In *re Widening of Fulton Street*, 226 N. W. 690, 64 A. L. R. 1507, the Supreme Court of Michigan held, as to widening a street:

"In the future this space, which the city seeks to add to Fulton Street, may or may not be used for parking. The land was taken for street purposes. *But parking is a proper use of the highway*, and, if necessity therefor exists, the right of eminent domain may be exercised to establish or widen highways adequate for this purpose. The taking of land for highways is not limited to that necessary for actual travel." (Italics ours.)

In that case the street was to be widened to provide a parking lane on each side of the widened street.

In *Cleveland v. Detroit* (1949), 37 N. W. (2) 625, 11 A. L. R. (2) 171, the court held that a subsurface automobile parking garage constructed under a public street constitutes off-street parking and is a proper highway use.

At present, on either side of roadway in the lower level of Wacker Drive, areas have been used for parking purposes for a long period of time. The proposed separation of the driveways from the parking areas is a proper traffic regulation. The proposed installation of parking meters or lifting devices, whereby the parking of automobiles may be controlled at a level above the surface of the street, thereby making more area accessible for movement of automobiles, is a proper traffic control. The space that the hoisting lifts will occupy is comparable to the space that parking meters would occupy. The channels upon which the automobiles will rest for hoisting purposes will not seriously interfere with the movement of cars even if in a state of repose on the ground level. The rates to be charged for parking by the hoist method will not be inconsistent with the method of charging for space in underground garages in streets, similar to the Michigan Avenue development. The City can construct like underground garages and, in our opinion, better regulations of the present parking areas in the bays by means of meters or hoisting devices, the improvement of the lighting system and the separation of the lanes of traffic for a more effective flow of traffic are within the police powers of the City of Chicago. Parking rates should be determined on an hourly basis. We do not deem it necessary to put a limit upon the number of hours an automobile may be allowed to park in this particular area.

Consideration should be given, however, to the accommodation of abutting property owners in making available access to their loading platforms. Cutting off such access would inject other factors that may imperil your program.

Consideration should also be given to provide necessary safety measures in the mechanical operation of the hoists, the protection of the public in getting in or out of the parked automobiles and the movements of automobiles to and from the parking areas.

Section 27-144 of the Municipal Code of Chicago requires Council approval of any parking plan and an ordinance should be prepared so that the City Council may designate the areas to be used for parking purposes and authorize the installations of parking meters (Section 27-145) and mechanical devices and establish the fees to be charged.

In the preparation of such an ordinance, consideration should be given to the provisions of Chapter 27 of the Code and amendments thereto so that the restrictions therein as to parking on streets are not made applicable to the proposed parking area.

FOREIGN CONSULATES

(No. 11800—Commissioner of Police—M. I. W.—April 2, 1954.)

In your letter of February 10, 1954 you state that the Police Department has in effect a policy of issuing so called courtesy cards to members of the various consulates of foreign governments having offices within the city.

You state that at the present time there are in the city about sixty-three (63) foreign consuls in Chicago, many employing large staffs, including Deputy Consuls, Attaches, commercial Representatives, etc. Your practice has been to issue such cards to all staff members whose names are presented by the Dean of the Consular Corps. You further state that the Chief of Traffic Reports has recently been deluged with requests from the holders of such cards who have received traffic summons to have such summons non-suited.

You attach to your letter a recommendation from the Chief of the Traffic Division that every courtesy be extended to the Consul General only, but that this policy should not be extended to any other representative and you request our opinion on this matter.

The question of immunity of foreign consuls from traffic regulations of the city was reviewed by us in an opinion directed to the Commissioner of Police dated August 5, 1949, in which we held that:

“* * * consuls are subject to traffic rules and regulations of the cities and states and cannot claim the same privileges and immunities as extended to ambassadors and ministers of foreign states.”

It follows that since the consideration heretofore afforded members of consular staffs has been an extension of courtesy rather than a requirement of law, you are free to review and modify that policy.

In that same opinion we pointed out that since United States District Courts are by statute given exclusive jurisdiction in civil matters pertaining to consuls and vice-consuls, and that since an action to recover a penalty for violation of an ordinance is a civil matter, the state courts are without jurisdiction and that prosecutions for ordinance violations against consuls and vice-consuls should be by suit in the United States District Court.

The granting of jurisdiction to the federal courts is limited to cases involving consuls and vice-consuls and does not extend to other members of consular staffs.

There is one further consideration which might have a bearing on this matter. The conclusions reached above flow from established principles of international law. These principles are subject to modification by treaties. It is conceivable that the United States has entered into agreements with some foreign states which extend the ordinary scope of immunity of representatives. If you will furnish us with a list of countries whose representatives have been receiving the courtesy you describe, we will initiate an inquiry with the appropriate federal agency seeking advice on the existence of any international agreements which might affect our practice in Chicago.

TRUCK PARKING

(No. 11818—Alderman, 14th Ward—A. F. G.—May 18, 1954.)

Your letter of April 28, 1954 is as follows:

"I have received several inquiries with reference to the parking of trucks in residential areas, particularly in my ward, and the standing of trucks in metered zones. In order that I may discuss these problems more thoroughly with my constituents, I am respectfully requesting that you be kind enough to give me an opinion on the ordinance concerning same, together with an interpretation as to what power to enforce the ordinance is invested in the Police Department. I would appreciate receiving several copies of each opinion so that I may send one to each of the Police Districts in my ward."

You later called this office and stated that in addition to the questions raised in your letter, you desired that we give consideration to the question of what action may be taken to prohibit the parking of trucks on vacant lots where parking is prohibited by the Chicago Zoning ordinance.

Chapter 27 of the Municipal Code of Chicago is the Traffic Code and its provisions and regulations apply only to the operation of vehicles on public ways. Section 27-125 reads as follows:

"27-125. No person shall stand or park any truck, tractor, semi-trailer, trailer or bus on any street in the city for a longer period than sixty minutes or for such time as is necessary for the reasonably expeditious loading or unloading of such vehicle, except that such standing or parking shall not be permitted on the days, during the hours and in the section of streets designated in section 27-128, and except that a driver of a bus may park such bus in a designated bus stand as is provided elsewhere in this chapter.

Any vehicle parked in violation of this section is hereby declared to be a nuisance which may be abated by any police officer by removing such vehicle to the city vehicle pound or to an authorized garage (Amend. Coun. J. 10-31-51, p. 1134)."

The exception referred to in the above section is that in the down town area bounded by Michigan avenue, Franklin street, Wacker Drive and Van Buren street, no commercial vehicle shall stand or stop for any purpose between the hours of 4:30 and 6:00 P. M. on week days Monday through Friday, holidays excepted.

The manner of enforcing the provisions of section 27-125 quoted above by the police is found in the second paragraph of that section.

Trucks may occupy space in a parking meter zone during the time the parking meters are in operation, but not after the meters cease operation.

With respect to your inquiry about parking trucks on vacant lots under the provisions of the Chicago zoning ordinance the following provisions are pertinent.

By Section 2 of the Zoning ordinance "Parking lot, except one located in a motor freight terminal district" and "Truck lot, except one located in a motor freight terminal district" are Special Uses. Section 24 of the Zoning ordinance provides the manner of approving Special Uses by the board of appeals and the rules governing such approval. "Parking lot" and "Truck lot" are defined in Section 2 of the Zoning ordinance as follows:

"Parking lot—Any land area used, or intended to be used for the storage of passenger automobiles and commercial vehicles under two ton capacity."

"Truck lot—Any land area, used or intended to be used for the storage or parking of three or more trucks, tractors, truck trailers and commercial and industrial vehicles while not loading or unloading, exceeding two tons in capacity."

From this definition of a "truck lot" any land area used or intended to be used for the storage or parking of not more than two trucks exceeding two ton capacity is not a special use which would subject it to the approval of the board of appeals. Nor is it a Class II public garage as that term is defined in Section 156-13 of the Code. Public garage is defined in that section as any premises where two or more motor vehicles are stored, or parked *for hire* in a condition ready for use or *where rent or compensation is paid* to the owner, manager or lessee of the premises for the storing of such motor vehicles. Nor is it a "public garage", as defined in the Zoning ordinance, as that definition only applies to a "building" used or intended to be used for the storage of motor vehicles, other than trucks, tractors, truck trailers and commercial vehicles exceeding two ton capacity.

Section 4 of the Zoning ordinance established ten Use Districts and provides in the second paragraph "No use shall be made of any land area or building within any use district except such as is designated hereinafter as a permitted use in that district nor shall any building be erected, reconstructed, altered or enlarged unless it is designed, arranged and intended for a use which is permitted in the district in which the building is located."

From the foregoing it appears that if a person owning a parcel of land and desiring to use it for the storage of two of his own trucks of over two ton capacity there is no provision in the Zoning ordinance permitting such use in any use district. Or if the owner of a parcel of land desired to permit a neighbor or friend, without compensation to store or park two such trucks on his land we can find no provision in the Zoning ordinance to permit such use in any use district.

In either of these cases if the land was intended to be used for the parking or storage of three or more heavy trucks it would be a special use under the Zoning ordinance and would be permitted in any use district less restrictive than a Specialty Shop district with the approval of the board of appeals (Section 24 Zoning ordinance).

It would appear to be unreasonable and discriminatory to permit under the Zoning ordinance a truck lot for the parking of three or more heavy trucks to be located in some use district, and deny to a lot used to park only two heavy trucks the right to locate in any use district.

We suggest, in order to avoid this discrimination, that the definition of "truck lot" in Section 2 of the Zoning ordinance be amended by striking the word "three" where it appears in that definition and inserting in lieu thereof the word "one". With this amendment a lot used for the storage of one or more heavy trucks would be a special use and subject to the provisions of Section 24 of the zoning ordinance regulating special uses.

If he finds by complaint or otherwise that trucks are being parked on vacant lots in violation of the zoning ordinance, the commissioner of buildings, who is the officer designated to enforce the zoning ordinance, notifies the owners in writing to cease the violation. If after the time fixed in the notice the violation still continues suit is brought in the Municipal Court and a fine imposed on the offender. If arrest and fine do not end the violation, the remedy of injunction is available to the City. This remedy is slow and expensive and is not generally invoked.

CONSTRUCTION OF CITY PARKING GARAGE

(No. 11839—Commissioner of Public Works—H. A. C.—August 5, 1954.)

Your communication of recent date advises that in the construction of the ramp to Parking Site No. 9, the location of the footings and foundation of the ramp in Carroll Avenue will require the relocation of two manholes and a section of duct line belonging to the Western Union Telegraph Company and that you had previously written the Western Union requesting that they relocate their facilities. You further advise that you expected that they would have to bear the expenses of the work which is in a City street. You have submitted copy of a letter that you have received from the Western Union wherein it declined liability on the grounds that in its opinion the City is proceeding with this construction in its proprietary capacity, and therefore the Telegraph Company is entitled to full reimbursement for any expense which it is put to by reason of the garage construction.

You request an opinion as to the liability of the City for any part of the expense for the relocation of the manhole and duct lines.

Site No. 9 is an integral part of the parking lot program of the City of Chicago pursuant to ordinances adopted by the City Council dated:

September 18, 1952 (C. J. pp. 3139 to 3167)

October 31, 1952 (C. J. pp. 3373 to 3374)

January 26, 1953 (C. J. pp. 4089 to 4100)

which were adopted pursuant to the provisions of Chapter 24, Section 52, Illinois Revised Statutes (1953), to which we will hereinafter refer to as "The Parking Act". The "Parking Act" grants to any municipality authority to acquire by purchase or otherwise to own, construct, equip, manage, control, erect, extend, maintain and operate motor vehicle parking lots * * * parking meters, and any other revenue producing facilities necessary or incidental to the regulation, control and parking of motor vehicles as the corporate authorities may, from time to time, find the necessity therefor exists, and for that purpose may acquire * * * property * * *.

The Parking Act has been held constitutional. In construing the Parking Act as constitutional in *Poole v. City of Kankakee*, 406 Ill. 521 (1950), the court at page 528 said:

"* * * we are aware of the fact that the modern economy and way of life are closely geared to the automobile, which fact has to be kept in mind in any aspect of community planning * * * the result has been to create a problem of national significance, for in many instances, the outmoded business streets of cities suffer from a traffic congestion which has strangled movement and business, directly affected the safety of those who use and cross them and affected the value and protection of adjacent properties. Ambulance, fire and police vehicles have difficulty reaching the scene of an emergency, * * *. As we view it, there is involved the safety and well-being of all the residents of a community so affected. We are of the opinion that the Parking Act embraces the taking of land for a public use."

and in answer to the argument that the use is a private use, the court said:

"The contention that the authority given the municipality to lease the parking facilities imputes a private purpose to the act is also without merit."

The court also stated Section 9 specifically states that the act

"shall not be constructed as authorizing any municipality to engage in any proprietary activity at or with any such parking facilities other than the parking motor vehicles."

The problems of Off-Street Parking are discussed in 8 ALR 2nd, and at page 376 summarized as:

"* * * It can be said that the greater amount of the authority * * * supports the view that the provision by a municipal corporation of off-street parking facilities for use by the general public is a public or municipal purpose as distinguished from a private one, at least where the primary object of the parking project is to alleviate traffic congestion and thereby promote the usability of the municipal streets for the movement of traffic."

We are of the opinion that the ordinances establishing the maintenance, improvement, extension and operation of parking facilities adopted by the City of Chicago conform to the "Parking Act", and that Site No. 9 was acquired for off-street parking facilities pursuant to the authority of the ordinances.

A similar contention that the City was acting in a proprietary capacity was urged by the Peoples Gas Light and Coke Company in the case of *Peoples Gas Light and Coke Company v. City of Chicago*, 413 Ill. 457 (1953), in seeking reimbursement for expenses and costs incurred by the company in connection with the protection, removal and relocation of mains and facilities made necessary by the reason of the construction of an initial system of subways. The Gas Company sought recovery contending that in constructing subways, the City was acting in a proprietary capacity. The principles involving the rights of the public and utility companies in the streets were analyzed by the court, which stated (page 464):

"So far as its streets are concerned, a City is only an agency of the State, and whether it has the fee or only an easement in the streets it holds them in trust for the people of the entire State. So far as their use for street purposes is concerned, every citizen of the State has an equal right * * *. The municipality cannot lawfully perform any acts itself nor permit others to do or perform anything in derogation of this right of the sovereign people, nor may the city permit any uses or encroachments which are unreasonable and against the public interests * * *."

The court gave considerable attention to the relative rights of the public and companies including utilities in the streets when used for surface travel and indicated that the same rules apply when the rights in the subsurface are in question, and held that the city was acting in its governmental capacity. It decided that there should not be recovery and that the Gas Company was required to relocate its mains and fixtures at its own expense.

We are of the opinion that in constructing, maintaining and operating off-street parking facilities, the City of Chicago is acting in its governmental capacity and is not exercising a proprietary right. We are of the further opinion that the approaches to the parking facilities are integral parts of the off-street parking facilities and that the City is not liable for the relocation of the manholes and duct lines owned by public utilities.

PARKING FACILITIES HOISTS

(No. 11841—Commissioner of Public Works—J. C. M.—August 16, 1954.)

In your letter dated August 10, 1954 you advise that certain parking facilities, being constructed by the City of Chicago, will include the Bowser System of hoisting motor vehicles to their parking locations in the parking facility. You state that you have been requested by the Bureau of Elevator Inspections to provide electric interlocks for the hatchway gates located at each floor and that under the Bowser System these hatchway gates are mechanically interlocked with the gate on the hoist cage and that it is your opinion that it would be impossible to provide the electric locks for these gates since more than one car hoist serves the same gates. You request an opinion as to whether or not the City shall be required to comply with the position taken by the Bureau of Elevator Inspections.

The pertinent provisions of the Municipal Code of Chicago are Sections 79-14 (including the definition of "hatchway door interlocks"); 79-19; 79-25; 79-26; 79-27; 79-28; 79-29 and 79-31.

Under Section 79-14 it is provided that on or before July 1, 1953 every existing power elevator shall be equipped with hatchway door interlocks of the hoist way unit system type, which shall comply with the provisions of this chapter. We are advised by the Bureau of Elevator Inspections that an ordinance was later passed extending the effective date from July 1, 1953 to January 1, 1954.

On November 16, 1953 (C. J. pp. 6018-6019) the City Council passed a special ordinance pertaining to the construction of the parking facilities by the City of Chicago and providing for the issuance of permits by the Commissioner of Buildings and the Division Marshal of the Bureau of Fire Prevention. In Section 1 of this ordinance we find the following provisions:

"(b) "Hoist Type" means a parking structure in which mechanical lift equipment of the Bowser Parking System type provides a combination vertical and horizontal operation for semi-automatic parking of vehicles in a multi-level parking structure."

"(d) "Hoistway" means the area extending from the bottom to top of a multi-structure in which the mechanical lift equipment operates."

Section 4 of the ordinance specifically provides that the hoist type equipment, that is, the Bowser Parking System type, is to be installed under permits in Parking Facilities Nos. 1, 5 and 8.

Section 2 of the ordinance provides as follows:

"The Commissioner of Buildings and the Division Marshal of the Bureau of Fire Prevention be and are hereby authorized and directed to approve plans and to issue permits for the construction of parking facilities described hereinafter *when in their judgment plans and specifications of said parking facilities conform with the provisions of this ordinance.*" (Italics added.)

Section 5 of the ordinance sets forth the provisions that "shall prevail and govern the action of the Commissioner of Buildings and the Division Marshal of the Bureau of Fire Prevention in their issuance of permits for the construction of said parking facilities."

We assume that the Commissioner of Buildings and the Division Marshal of the Fire Prevention Bureau have issued the necessary permits for the construction of the parking facilities where the Bowser type of hoists or elevators are to be installed.

There seems to be a difference of opinion between your department and the Bureau of Elevator Inspections of the Building Department as to whether the Bowser System satisfies the requirements of these sections in Chapter 79 of the Municipal Code of Chicago, as above set forth. The City Council having passed specifically upon the problems presented by the construction of the parking facilities, including the type of the elevator system to be installed, evidently were of the opinion that the installation of the Bowser System in the parking facilities would constitute a compliance with Chapter 79. The Commissioner of Buildings and the Division Marshal of the Fire Prevention Bureau having issued permits as authorized and directed by the ordinance of November 16, 1953, concurred in such interpretation of the Code provisions and it is our opinion that all doubts as to whether or not the Bowser System complies with the Code provisions are to be resolved in favor of such compliance.

PARKING FACILITIES' CLAIM CHECKS

(No. 11846—Commissioner of Streets and Sanitation—J. E. S.—September 7, 1954.)

This office acknowledges receipt of your letter dated September 1, 1954 wherein was requested an opinion as to form and legality of the below quoted statements which may appear on the reverse side of the parking tickets to be used in connection with attendant-operated, City owned, parking facilities.

The statement, "This is your parking facility operated for your convenience. It has been financed by Parking Revenue Bonds as part of a Fifty Million Dollar Municipal Parking Program," is unobjectionable.

The statement, "The operator of this parking facility will use every effort to render efficient service and protect the property of its patrons," should be amended to omit therefrom the words "and protect the property of its patrons". Said words may be construed as an assumption by the bailee of the liability of an insurer, and, therefore, should be avoided.

The statement, "Neither the City nor the operator will be responsible for any personal property left in your automobile", if left standing alone, without other notice may likewise be misleading to patrons as regards their legal status. The law generally provides that where a bailor receives and retains a ticket without knowing that it contains any special terms or conditions and without his attention being called to that fact, and on further assumption that the ticket is merely a token or means of identifying his property, then such retention of the ticket does not constitute an acceptance of the terms therein and he is not bound by the provision for limited liability, on the theory that the minds of the parties never met: hence, a special contract was never entered into.

If, however, in addition to the disclaimer of liability printed on the ticket, the operator-bailee posts a notice or notices within the garage and they are placed in such manner that a driver or any of his passengers cannot avoid seeing same when entering the garage and said notice or notices contain:

- a. A disclaimer of liability for personal property left in the automobile;
- b. A direction to patrons to read the claim ticket;

- c. A statement regarding the lack of authority of the employees to accept responsibility for articles left in cars;
- d. An offer of checking service for personal property; and
- e. A request that the key to the trunk be retained by the patron;

it seems highly unlikely that the patrons will not be made aware of their position.

Ohge v. LaSalle-Randolph Garage Corporation, 328 Ill. App. 665.

The question of the status of the operator be it that of landlord or of bailee, and his attendant responsibility, if any, for the automobile and its contents is not intended to be discussed herein. An extensive opinion upon that question will be rendered if requested.

Subject to the non-use of the phrase "and protect the property of its patrons", and the posting of other notice as discussed above, the statements are approved as to form and legality.

PARKING FACILITY LIABILITY

(No. 11871—Commissioner of Streets and Sanitation—J. E. S.—December 6, 1954.)

In your letter of recent date you requested an opinion as to form and legality of certain submitted statements to appear on signs and parking contracts to be used at attendant-operated parking facilities.

The statement to appear on the signs within the parking facility which reads: "*Not responsible for loss or damage of cars or their contents from fire, theft or any other causes.* PLEASE READ THE CONDITIONS CONTAINED ON YOUR TICKET", is not legally accurate.

The law generally provides that the bailee-operator of a parking facility cannot relieve himself of liability for loss or damage to a bailed automobile if said loss or damage occurs through his negligence or (where applicable) that of his employees.

"The Parking Lot Cases."

27 Georgetown Law Journal 162.

Glende v. Spraner, 198 Ill. App. 584.

Burge v. Englewood Motor Car & Garage Co., 213 Ill. App. 357.

Weinberger v. Werremeyer, 224 Ill. App. 271.

Evans v. Williams, 232 Ill. App. 439.

Rhodes v. Warsawsky, 242 Ill. App. 101.

Black v. Downtown Parking Stations, 332 Ill. App. 418.

The reference in the above quoted statement to the contents of the bailed automobiles, although legally proper, should be set apart so the patrons may be made fully cognizant of their position. As outlined in a previous letter a bailee-operator of a parking facility can generally disclaim responsibility for articles of personal property left in automobiles provided that adequate notice is posted.

Ohge v. LaSalle-Randolph Garage Corporation, 328 Ill. App. 665.

The statement in paragraph 2 of your letter is subject to the same comment as regards a differentiation between the car itself and the contents thereof.

To better illustrate the foregoing, the following form is suggested :

1. The statement to appear on the sign posted within the parking facility should read substantially as follows :

"Not responsible for loss of or damage to automobile by fire, theft or otherwise unless the loss or damage is caused solely by negligence of the operator, or (where applicable) his employees.

"Not responsible for loss of or damage to personal property left in automobiles under any circumstances. The employees have no authority to accept responsibility for such items of personal property. Checking facilities are provided for your convenience and you are requested to utilize them.

"Please read the conditions contained on your parking contract."

2. The statement to appear on the parking contract given to the automobile owner should read substantially as follows :

"The City, its operator and his employees will at all times endeavor to render prompt, efficient and courteous service. You are advised, however, that the City, its operators and his employees are :

- (a) not responsible for loss of or damage to your automobile by fire, theft or otherwise unless the damage is caused solely by negligence of the operator or (where applicable) his employees ;
- (b) not responsible for loss of or damage to personal property left in your automobile under any circumstances. The employees have no authority to accept responsibility for such items. Checking facilities are provided for your convenience."

PARKING FACILITY RATES

(No. 11896—*Commissioner of Streets and Sanitation—J. R. B.—April 18, 1955.*)

In your letter of recent date you request our opinion as to whether or not the Commissioner of Streets and Sanitation may raise the rates for parking at Parking Facility No. 8 under :

1. Lease agreement between the City of Chicago and Downtown Parking Stations, Inc.
2. The Ordinance authorizing City of Chicago Parking Facility Revenue Bonds (C. J. Sept. 18, 1952, pp. 3142-3167).

Paragraph 23 of the Lease Agreement between the City and Downtown Parking Stations, Inc. established rates for Parking Facility No. 8 and contains in addition the following provision :

"The fee to be charged by the operator may be changed from time to time by the Commissioner if, in his opinion, the traffic conditions and the public policy deem it advisable. If for the same reasons, he deems it advisable, the Commissioner may establish fees on a weekly and monthly or on a fleet rate basis."

The ordinance authorizing City of Chicago Parking Facility Revenue Bonds was passed by the City Council pursuant to Article 52.1 of the Cities and Villages Act (Chap. 24, Art. 52.1, Ill. Rev. Stats. 1953). Paragraph 52.1.4 of said Act provides:

"Whenever bonds are issued as provided by this article, it shall be the duty of the Corporate Authorities to establish charges and fees for the use of any such Parking Facilities * * *".

The tenor of this paragraph is carried into the City ordinance as Section 501 which provides:

"The City covenants and agrees that so long as any of the bonds remain outstanding, it will at all times establish and collect fees, rates and other charges for the use of all of its Parking Facilities * * *".

It is our opinion that any change in such rate, established by the City Council, or the establishment of rates for different types of service such as weekly, monthly or fleet rates would have to be in compliance with the provisions of the aforesaid ordinance. And while the Commissioner may propose a change as outlined in Paragraph 23, any change in parking rates, either for individual or volume user, must comply with section 501 of said ordinance and be established by the City Council.

Your letter further states "and if these rates may be so changed, what additional authority is needed."

It is our opinion, in view of the foregoing, that the fixing of rates is a legislative function and the rates may be changed by the City Council only; any delegation by the City Council of that authority would be improper (*People ex rel. Smith v. Meerts*, 266 Ill. 210).

LEGALITY OF TRUCK ROUTES

(No. 11904—Director, Chicago Plan Commission—A. F. G.—May 9, 1955.)

In your letter of April 6, 1955 you say:

"In cooperation with several other departments, we are considering recommending the designation of certain streets as truck routes, with the idea that trucks would be excluded from streets not so designated and concentrated on those to be so designated.

I would appreciate very much your opinion as to (a) the extent to which an ordinance to this effect could be legally enforced, and (b) whether or not there are any legal implications in the possible damage to property values along streets designated as truck routes."

On December 14, 1931 this office sent to the Alderman of the 10th Ward Opinion No. 7375 which appears to cover the subject matter of your inquiry. The opinion is as follows:

"We are in receipt of your recent letter requesting an opinion of the corporation counsel relative to how far the city of Chicago can go in restricting traffic on the various streets within the limits of the municipality.

We note that you say:

"Many property owners on exclusively residential streets would like to have their thoroughfares paved or re-surfaced but

find it inadvisable to do so because when the street is paved it becomes the mecca of promiscuous traffic and even trucks and buses will use it in preference to the so-called heavy duty streets. To provide a type of pavement to withstand the modern traffic stream is almost prohibitive for the small property owners. If we could have certain streets designated as heavy duty arteries and such streets maintained out of the gasoline tax or the vehicle tax without additional cost to the property owners and exclude heavy trucks and buses in transit from the residential streets, it would be possible to proceed with an economical paving program in these residential areas that would be sufficient to meet the requirements of the people living on such streets.'

Sections 7 and 9 of the Cities and Villages Act gives the city council power:

'Seventh. To lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same * * *

Ninth. To regulate the use of the same.'

In our opinion the power thus granted is sufficiently broad to authorize the city council to classify streets in the manner you suggest and to make different traffic regulations based upon such classification.

In the case of *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9, where the town of Cicero had passed an ordinance which prohibited heavy traffic on a certain street in that municipality, the Supreme Court, after calling attention to the facts that, with certain qualifications, the legislature has plenary power to vacate streets, and has delegated such power to cities and villages, said, at page 24:

'The power to vacate or discontinue a street, qualified in the manner thus stated, necessarily involved the power to change the use of the street. The greater power of absolutely vacating necessarily includes the lesser power of regulating or restraining. If, therefore, the legislature had the power to confer upon the town of Cicero the authority to vacate one of its streets, it certainly had the power to confer upon that municipality the power to limit the use of a street to a particular purpose benefiting all the public, and not exclusively shared by any class of the citizens.'

That the city council, in the exercise of its power to regulate the use of streets, may pass any reasonable ordinances it deems proper to accomplish such purpose, has repeatedly been held by our Supreme Court.

People v. Walsh, 96 Ill. 232.

City of Chicago v. Mussey, 87 Ill. 378.

City of Chicago v. Union Bldg. Ass'n, 102 Ill. 379.

Gartside v. City of E. St. Louis, 43 Ill. 47.

City of Lincoln v. Gerard, 329 Ill. 501.

And that an ordinance duly passed by the city council is presumed to be reasonable unless the contrary clearly appears, has also been frequently stated.

McCray v. City of Chicago, 292 Ill. 60.

Dorwart v. City of Jacksonville, 333 Ill. 143.

Melton v. City of Paris, 333 Ill. 190.

Our Supreme Court has specifically held that a city or village has the power to limit the weight of the vehicle and its load upon the public streets.

City of Chicago v. Foley, 335 Ill. 584.

Ferguson Coal Co. v. Thompson, 343 Ill. 20.

In the last mentioned case, the court passed upon the precise question here involved and held that the city of Chicago has the power to classify streets and prescribe different maximum weights of vehicles for different streets. In that case the city had adopted an ordinance excluding heavy traffic vehicles from Addison street (and similar ordinances relative to certain other streets). The Supreme Court, in sustaining the validity of the ordinance, said:

'In 44 Corpus Juris, 1031, it is said: "A municipality, under its power to control and regulate the use of its streets, may limit the weight of vehicles or loads that may be transported over its streets. It may prohibit the operation of any vehicle which, with or without its load, because of the weight, destroys or permanently injures the street". * * *

The determination as to whether or not an ordinance limiting loads is reasonable depends upon the *requirements of the different localities, pavements* and the need for *traffic regulation and segregation*. Where an ordinance is within the grant of power conferred upon municipalities the presumption is that it is reasonable. (*McCray v. City of Chicago*, 292 Ill. 60). * * *

Appellees' witnesses testified that the pavement on Addison Street is not designed or capable of withstanding use by heavy traffic and that it is necessary to *segregate heavy traffic* in order to relieve conditions and facilitate traffic. While appellant and the public in general are prohibited from using these streets for through hauls and they may suffer some inconvenience by not being permitted to take the most direct routes and suffer some increase in the cost of delivery by reason of traveling a few blocks out of the direct line to avoid restricted streets, these facts do not necessarily make the ordinances unreasonable or subject them to attack by appellant.'

In our opinion the *Ferguson Coal Co.* is exactly in point and clearly controlling on the question submitted to us.

We are therefore of the opinion that the city council has full power and authority to make any reasonable classification of streets it deems proper and to designate certain streets for heavy traffic and others for light traffic and to adopt plans of paving in accordance therewith."

Sections 7 and 9 of the Cities and Villages Act, referred to in the second paragraph of the foregoing opinion are now sections 23-8 and 23-10 respectively of the "Revised Cities and Villages Act". It might be of interest to you to know that the Municipal Code of Chicago now provides special routes for trucks carrying flammable liquids. The location of the routes and the regulations concerning the transportation are found in sections 129-55.4 to 129-55.8 both inclusive, of the said code.

REDUCING PARKING METER LIMITS

(No. 11922—City Traffic Engineer—A. F. G.—July 1, 1955.)

Your letter of June 22, 1955 is as follows :

"This Bureau is desirous of changing certain selected meters in various parking meter areas to limited times of 10, 12, 15 or 20 minute operation. The meter ordinances presently in effect state that the '* * * Parking in such parking meter zones shall be limited to one hour * * *'.

We would like to have an enabling ordinance drafted of the type that would permit the Commissioner of Streets and Sanitation to designate certain meter stalls as 'Limited Parking' of 10, 12, 15 or 20 minute maximum.

The questions brought to our attention in this regard are :

- 1) Is this type of ordinance workable from a legal standpoint?
- 2) Must each meter area ordinance be amended in which we wish to change the meter time limits on specified meters?
- 3) Must the exact meter stall be specified in the ordinance amendment or can this be left to the discretionary powers of the Commissioner of Streets and Sanitation as is in the case in installing or removing Loading Zones, Bus Stops, Safety Zones and etc."

In answer to question 1), we are of the opinion, that amendments to meter area ordinances such as you suggest may meet the test of validity if the ordinance provides some rule or standard by which the discretion of the Commissioner is regulated and controlled. As to question 2) we believe it would be necessary to amend each meter area ordinance in areas, which a proper survey shows the necessity of limiting parking in certain meter stalls to less than the maximum fixed in the ordinance. In answer to question 3) we do not believe it would be practical for the council to specify in each meter area ordinance the particular meters that are to have time limitations less than those fixed in the ordinance. We are of the opinion that the designation of the particular limited time meters may legally be left to the discretion of the commissioner of streets and sanitation, if the council provides some rule or standard by which the unrestricted discretion of the commissioner may be controlled.

We have prepared a draft of a proviso which may be inserted in its proper place in the section of each meter area ordinance which provides for the one hour limitation. That proviso to read substantially as follows :

" ; Provided, however, that whenever the commissioner of streets and sanitation on the basis of a traffic engineering survey, determines that parking in certain specified meter stalls in the said meter area, should be limited to a lesser period of time, he may designate the particular meters and the time limit applicable to the same. The limited time meters in such meter stalls shall be conspicuously marked so as not to confuse them with the hourly meters."

If your traffic engineering survey convinces you that in any specified parking meter area parking conditions would be improved by providing that certain meters be limited to less than one hour, we shall be pleased to prepare an amendment as outlined above, if you will furnish us the designation of the parking meter area, the date and page of the Council Journal where it appears.

LEASING PARKWAY FOR PARKING

(No. 11927—Committee on Local Industries, Streets and Alleys—
C. P. H.—July 18, 1955.)

We have your letter of July 7, 1955, wherein you state that a number of proposed ordinances have been referred to the Committee on Local Industries, Streets and Alleys providing for the leasing by the City to certain industries of parkways, between the curbs and sidewalks on certain designated streets, for the parking of automobiles of employees of the industries. It is our understanding that one such ordinance is sought by Denoyer-Geppert Company which operates an industrial plant at 5235 N. Ravenswood Avenue. You request our opinion as to the City's liability for damages arising out of accidents that may occur in any of these leased spaces. The first question present for determination is whether the ordinances, if adopted, would be valid.

Under sections 23-10 and 23-27 of the Revised Cities and Villages Act, the city has express power to regulate the use of streets and the traffic thereon. (Ill. Rev. Stat. 1953, ch. 24, pars. 23-10 and 23-27). In the case of *City of Bloomington v. Wirrick*, 381 Ill. 347, (1943), the court held that by virtue of these regulatory police powers, municipalities have the implied power to charge fees for the privilege of parking motor vehicles on the city's streets. In the course of the opinion the court stated that the fees assessed were to cover the cost of supervision and control of parking and were not levied for the use of the streets. The court also pointed out that the city cannot rent the streets for a private purpose. This latter rule was reiterated by the court in the cases of *Village of Lombard v. Illinois Bell Telephone Company*, 405 Ill. 209 (1950); *City of Chicago Heights v. Western Union Telegraph Company*, 406 Ill. 428 (1950); and *City of Chicago Heights v. Public Service Company of Northern Illinois*, 408 Ill. 310 (1951).

In the case of *People v. Wolper*, 350 Ill. 461 (1932) the court had under consideration the validity of an ordinance which leased for the period of one year a portion of a parkway for the erection and maintenance of gasoline pumps. The court in holding the ordinance void stated at page 466:

"A permanent encroachment upon streets for private use is a purpresture and is in the law a nuisance (*Hibbard & Co. v. City of Chicago*, 173 Ill. 91; *Driggs v. Phillips*, 103 N. Y. 77; *Smith v. State*, 23 N. J. L. 712). Power of a city to authorize the use of public streets for private purposes has been uniformly denied by this court. When a public street is once established all beneficial uses vest in the public. These include the uninterrupted and unobstructed use of any portion or part of such public highway. These rights of the public are inconsistent with the right of a private citizen to encroach upon the streets by the erection of a permanent structure. Streets are held in trust by the municipality for the benefit of the public and may not be given away by ordinance (*People v. Corn Products Co.*, 286 Ill. 226; *Tolman v. City of Chicago*; 240 id. 268; *People v. Atchison, Topeka and Santa Fe Railway Co.*, 217 id. 594; *People v. Harris*, 203 id. 272; *Snyder v. City of Mt. Pulaski*, 176 id. 397). Any permanent structure or purpresture which materially encroaches upon a public street and impedes travel is a nuisance per se and may be abated notwithstanding space is left for the passage of the public. If it were in each instance to be determined, as a question of fact only, how far such obstruction might encroach upon the highway without becoming a nuisance there would be no certainty in the law, as there would arise in each case the question of fact whether such obstruction was a hindrance to travel and to public use. If one may so obstruct a public highway then may also another, resulting in serious hindrance to the use of the streets

by the public. In the absence of clear legislative enactment the only safe way is to adhere to the rule as announced in the cases here cited. *People v. Harris, supra*; Elliott on Roads and Streets, p. 478."

In an opinion dated September 21, 1953 addressed to the Commissioner of Streets and Sanitation, appearing in Volume 23 of the Opinions of the Corporation Counsel at page 719, we had occasion to deal with a similar situation and we there stated that the City does not have power to charge parking fees for the privilege of parking motor vehicles for periods up to twenty-four hours in the parkway of Stony Island Avenue from 69th Street to 72nd Street. In another opinion dated April 30, 1951 addressed to the Commissioner of Subways and Superhighways, appearing in Volume 23 of the opinions of the Corporation Counsel at page 711, we held that the city does not have power to adopt an ordinance to exact fees for the privilege of parking motor vehicles overnight on city streets.

It is therefore our opinion that the proposed ordinances referred to in your communication, which authorize the use of parts of the City's streets for a purely private purpose to the exclusion of the general public, if adopted by the City Council would be void under the authorities cited herein.

With reference to your inquiry as to the City's liability for damages arising out of accidents that may occur in any parkway, it is a well established principle of law that the primary obligation of keeping the streets in a safe condition for public travel rests upon the City and it cannot evade this obligation or cast it upon others by any act of its own (*Hogan v. City of Chicago*, 168 Ill. 551 (1897) ; and *Lau v. City of Chicago*, 153 Ill. App. 50 (1910)). A parkway is a part of the public highway.

RADAR WARNING SIGNS

(No. 11935—Commissioner of Police—A. F. G.—August 15, 1955.)

In your letter of July 28, 1955 you request an opinion as to the necessity of posting "Radar Controlled" signs on streets where radar devices are in use for the purpose of controlling excessive speed by motorists.

Your letter was accompanied by a letter from Chief Ahern suggesting reasons for the necessity of such an opinion.

We are advised that the device used is a mechanical one, about the size of a storage battery and is usually carried in a traffic squad car. It accurately records the speed at which passing motor vehicles are travelling. When the device indicates that a passing motor vehicle is exceeding the speed limit permitted on the street, the officer in charge of the squad car telephones another officer stationed several blocks further down the street, giving a description of the car, the license number, etc., whereupon the second officer apprehends the driver and gives him a ticket charging him with speeding. The courts recognize the validity of such an arrest when both officers appear in court and testify.

When an arrest for violation of the speed laws is made by a motorcycle policeman or the operator of a squad car who follows a speeder, the evidence of the speed at which the offender is travelling is secured by means of a mechanical device; a "speedometer". The courts recognize this evidence.

Where a street is patrolled by motorcycle policemen or squad cars equipped with speedometers for the apprehension of speeders, it could hardly be contended that the police department be required to post signs that the

street is so policed. We see no reason in law why, on a street patrolled by the same policemen and squad cars equipped with radar devices for the measuring of speed, "Radar controlled" signs should be posted.

While the posting of such signs might have the psychological effect of minimizing speeding by motorists, we are of the opinion such posting is not required as a matter of law.

TWO AND THREE HOUR PARKING METERS

(No. 11990—City Traffic Engineer—A. F. G.—December 14, 1955.)

We have your letter of December 1, 1955 which is as follows:

"The Bureau of Street Traffic and Parking has received numerous requests for installation of curb parking meters of a two or three hour duration. Through parking demands and turnover studies we have found that in some areas a demand exists for two to three hour curb parking regulation.

At the present time the City of Chicago does not have any curb parking meters with time restrictions in excess of ninety minutes.

The Bureau is concerned with the question of whether two or three hour curb parking meters would be deemed a traffic control device under the provisions of the Illinois Revised Statutes or simply a revenue measure whereupon they could be declared illegal.

We request your advice as to the legality of such two or three hour curb parking meters. Inasmuch as we have numerous requests for such installation pending, we would appreciate an early opinion in this matter."

In an opinion to you dated July 1, 1955 we held that in any specified parking meter area, if a traffic engineering survey showed that parking conditions would be improved by providing that certain meters be limited to less than one hour, that such a limitation would be valid if provided for by a form of ordinance suggested in the opinion.

If a similar traffic survey showed that parking conditions would be improved by providing that parking in certain particular meter stalls in a meter area be permitted for periods of time greater than one hour, we see no reason why such an extension of time, if provided for by a proper ordinance would not be a valid exercise of the power to regulate the use of the streets and the power to regulate traffic.

By ordinance adopted July 26, 1955 (C. J. July 26, 1955, pp. 922-923) the city council provided an amendment applicable to each parking meter ordinance, by which the commissioner of streets and sanitation in any meter area after a traffic engineering survey shows the necessity therefor may limit particular meter stalls to a lesser or greater period of time and authorizes him to designate and mark conspicuously the particular meters and the time limit applicable thereto.

While most of the parking meter ordinances limit parking time to a maximum of one hour, and in a few cases to ninety minutes, it is our opinion that in certain areas where a survey shows the necessity thereof, a maximum limit of two to three hours would not be held invalid.

TOW AWAY FOR OVERTIME PARKING

(No. 11999—Alderman, 5th Ward—A. F. G.—January 12, 1956.)

Your letter of January 9, 1956 is as follows :

"I should appreciate an opinion as to whether M. C. C. 27-173 (3), which authorizes removal of a motor vehicle which is an 'obstruction to the normal movement of traffic', would permit removal of a vehicle which has over-stayed its time at a parking meter.

The practical reason for the request is that out-of-state cars which overpark can not be ticketed and eventually can be dealt with effectively only if the ordinance permits removal."

Section 27-173 of the Traffic Regulations of the Code enumerates the circumstances under which members of the police department are authorized to remove a vehicle from any public way to the nearest city vehicle pound or to an authorized garage. They are six in number and are as follows :

"(1) When any vehicle is left unattended upon any bridge or viaduct, or in any subway or tunnel, or upon any approach thereto, where such vehicle constitutes an obstruction to traffic.

(2) When a vehicle upon any public way is so disabled as to constitute an obstruction to traffic and the person or persons in charge of the vehicle are by reason of physical injury incapacitated to such an extent as to be unable to provide for its custody or removal.

(3) When any vehicle is left unattended upon any public way and is so parked illegally as to constitute a definite hazard or obstruction to the normal movement of traffic.

(4) When any abandoned vehicle is found on any public way.

(5) When any vehicle illegally occupies parking meter space for an unreasonable period of time.

(6) When any vehicle is parked in violation of section 27-125."

Paragraph 5 of this section appears so aptly to apply to the example you cite, that it would seem unnecessary to attempt to construe paragraph (3) in its application to the same set of facts, which construction would, to say the least, be doubtful.

If a member of the police department finds a vehicle illegally occupying a meter space (particularly if such vehicle is an out of town vehicle), he may, in our opinion, legally cause the vehicle to be towed to the City pound or authorized garage under authority of said paragraph (5).

FOREIGN CONSULS AND OFFICERS

(No. 12012—Commissioner of Police—A. F. G.—February 20, 1956.)

Your letter of February 9, 1956 is as follows :

"The attached traffic summons A 328178 was sent to this office by David M. W. Hummel, Commercial Officer, Office of the Canadian Consul, 111 N. Wabash Ave., with the following quoted letter :

'I enclose a meter violation ticket which was placed on my car. At that time I was on official business and must have over-parked. I do hope the ticket can be cancelled.'

With reference to the law of arrest governing Consuls, is this extended to include a 'Commercial Officer'?"

On September 9, 1949 we sent you the following letter :

"We acknowledge receipt of your letter of August 9, 1949 attaching a report dated August 6, 1949 from the Acting Chief of the Traffic Bureau in which he requests our opinion as to whether Eduardo L. Rosal, Vice Consul, Philippine Consulate, is immune from arrest for disobedience to a traffic signal, whether the arresting officer acted within his rights when he took action for a hazardous traffic violation; and whether the traffic bureau should petition the Chief Justice of the Municipal Court to void the summons in question.

In our letter of August 5, 1949, in answer to your request for our opinion as to what action should be taken by your office in regard to persistent violation of the traffic rules and regulations governing the parking of automobiles in restricted areas by members of the foreign consulates in Chicago, we concluded :

1. Foreign consuls and vice consuls are subject to traffic rules and regulations of the City; and
2. Since the Federal courts are given exclusive jurisdiction in civil matters pertaining to consuls and vice consuls by Federal statute, and an action to recover a penalty for violation of a municipal ordinance is a civil matter, the state courts are without jurisdiction.

Therefore we are of the opinion that Eduardo L. Rosal, Vice Consul, Philippine Consulate, can claim no immunity to arrest for disobedience to a traffic signal and that the arresting officer acted within his rights when he took action for a hazardous traffic violation. However, as the Municipal Court has no jurisdiction over the matter, we suggest that the traffic bureau petition the Chief Justice of the Municipal Court to void the summons in question and that if you desire to prosecute the matter further, suit then must be instituted in the United States District Court." (Vol. 22, Opinions Corporation Counsel, p. 701.)

This opinion summarizes an opinion sent to you August 5, 1949 on the same subject matter. This latter opinion fully discusses the right, privileges and immunities of foreign consuls, and cites decisions from numerous State and Federal courts, statutes, text books and other authorities. This opinion is published in full in Vol. 23 of Opinions of the Corporation Counsel at page 698.

We do not know what the duties of a "Commercial Officer" of the office of Canadian Consul are, but we assume that he is an agent or assistant of that official. We do not believe that an employee or attache of the consul would have greater immunity under the law than the consul himself. If the Canadian Consul himself had violated the same traffic regulation as that with which the Commercial Officer is charged with violating, he would, under the opinions referred to above be subject to the penalties of such violation.

In the present case we suggest that you petition the Chief Justice of the Municipal Court of Chicago to void the summons in question, and as the traffic violation was so minor we do not recommend suit in the United States District Court. We return the summons.

SNOW REMOVAL AND PARKING METERS

(No. 12014—Commissioner of Police—J. P. M.—February 23, 1956.)

In your letter of February 15, 1956 you request an opinion as to whether Section 27-126 entitled "Parking at night and during snow removal" and Section 27-126.1 entitled "Parking during snow removal" of the Municipal Code of Chicago take precedence and supersede parking meter areas and areas in which parking is allowed during certain periods when there is a snow fall in excess of one inch.

The purpose of the above sections of the Municipal Code is to facilitate the removal of snow from the streets on which a street railway or motor bus line is operated in order that the citizens who use public transportation can be expeditiously transported.

Chapter 95½ entitled "Motor Vehicles", Section 123-26 of the Illinois Revised Statutes provides:

"Powers of Local Authorities—

(a) The provisions of this Act shall not be deemed to prevent local authorities with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power from—

1. Regulating the standing or parking of vehicles * * *

(b) No ordinance or regulation enacted under sub-divisions (1) * * * of this section shall be effective until signs giving notice of such local traffic regulations are posted upon or at the entrances to the highway or part thereof affected as may be most appropriate."

It is the opinion of this office that the sections of the Municipal Code of Chicago dealing with "Parking during snow removal" can take precedence over parking meter and parking sign areas provided signs giving notice of such precedence are posted in accordance with Chapter 95½, Section 123-26 of the Illinois Revised Statutes.

HOUSE TRAILER

(No. 12065—Commissioner of Police—E. V. H.—August 10, 1956.)

We have your request for an opinion as to the application of Ch. 27-125 of the Municipal Code.

The question is whether that section restricts the parking of an unoccupied private house trailer on a residential street.

Ch. 27-125 provides:

"No person shall stand or park any truck, tractor, semi-trailer, trailer or bus on any residential street for a longer period than is necessary for the reasonably expeditious loading or unloading of such vehicle * * *.

* * * * *

"Any vehicle parked in violation of this section is hereby declared to be a nuisance which may be abated by any police officer by removing such vehicle to the city vehicle pound or to an authorized garage."

The term "trailer" is not defined within said section, but it is defined in Ch. 29 (Wheel Tax Licenses) of the Municipal Code as "a highway vehicle designed to be attached to and hauled by a vehicle other than a tractor."

Following that definition, a private house trailer is required to carry the same wheel tax license as would an ordinary trailer of the same weight.

The term "vehicle" is defined in Ch. 27 of the Municipal Code as "every device in, upon or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails or tracks."

Since a private house trailer is categorized with ordinary trailers for the purposes of wheel tax licenses under Ch. 29 of the Municipal Code, since the plain-meaning of the quoted provisions of Ch. 27 is to restrict undue obstruction of residential streets by the parking of vehicles larger than passenger automobiles; and, since such private house trailer is within the definition of "vehicle" in the quoted provision of Ch. 27, it is our opinion that a private house trailer is included within the term "trailer" as used in Ch. 27-125 of the Municipal Code.

Therefore, any person standing or parking a house trailer must comply with the provisions of Ch. 27-125 of the Municipal Code.

TRUCK IDENTIFICATION INSIGNIA

(No. 12070—Commissioner of Police—A. F. G.—August 24, 1956.)

We have your letter of August 23, 1956 to which was attached a report from the Chief of the Traffic Division relating to arrests of driver of Bishop David Freeman Co., 1600 Foster Street, Evanston, Ill. for violation of Section 20 of "The Illinois Motor Carrier of Property Act" (Paragraph 282.20, Chap. 95½ Ill. Rev. Stats.).

So much of that section as is pertinent is as follows:

"282.20 Sec. 20. Identification insignia on trucks. It shall be unlawful for any *common or contract* carrier by motor vehicle to operate any truck upon the highways of this State unless there is painted or otherwise firmly affixed to such truck on both sides thereof in a color or colors vividly contrasting to the color of the truck the name and address of the operator thereof, the maximum empty weight of such truck, and the certificate or permit number of such carrier.
* * *

The terms "common carrier" and "contract carrier" are defined in Section 2 of the Act as follows:

- "(9) The term 'common carrier of property by motor vehicle' means any person, who undertakes to transport property within the state for the general public in intra-state commerce by motor vehicle for-hire, whether over regular or irregular routes, and
- (10) The term 'contract carrier of property by motor vehicle' means any person, who under individual written bilateral contracts, transports property in intra-state commerce by motor vehicle for-hire."

Section 3 of the said Act contains the following exception:

"(h) Motor vehicle transportation of property by any person incident to or in furtherance of any private commercial enterprise of such person other than the business of transporting property of others for hire."

The file indicates the Company is engaged in private business and the truck in question is operated for the purpose of transporting merchandise incident to their business and not for hire. The Company is not a common carrier or a contract carrier as these terms are defined in the Act and in our opinion is not subject to the provisions of Section 20 of the Act. We think the arrest ticket was improperly issued.

We suggest that you advise the Chief of the Traffic Division to warn the officers in his command before issuing tickets for violation of the said Section 20 to be sure that the operator of the truck is a "common carrier" or a "contract carrier" as only this class of carriers are subject to the section.

LEGAL HOLIDAYS FOR LOOP PARKING

(No. 12118—P. P.—A. F. G.—April 30, 1957.)

Your letter of April 26, 1957 is as follows:

"A friend of mine was issued a ticket by a member of the Chicago Traffic Police on Good Friday, April 19, 1957 for violation of the Chicago Code section above mentioned. The sign posted near the space in which he parked said that parking was prohibited between certain stated hours except for Sundays and Holidays. Upon finding the ticket on his windshield, he immediately proceeded to the court room at 321 North LaSalle Street to pay his fine, but was confronted by a closed door on which there appeared a sign saying 'Closed—Legal Holiday.'

It is true that Code Section 27-127 does not mention Good Friday as one of the days on which parking is permitted in the loop, but it is also true that the signs posted throughout the loop do not make a distinction between those 'legal holidays' which are not enumerated but nevertheless considered by the city to be legal holidays.

My friend may technically be guilty of the parking violation, but I think you must agree with me that he was not entirely at fault in relying upon the sign posted near the place where he parked. I think something ought to be done so as to make the signs conform with the code or else to make the code conform with the signs.

I shall be pleased to have such comments as you may care to make on this irritating situation."

Section 27-1 Definitions, defines "Holidays" as follows:

"Holidays. When used in this chapter or on official signs erected by authority of this chapter shall mean New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day."

Section 27-127 is the loop parking provision and has been in the code for a number of years, formerly as section 27-29. This section prohibits the standing of a passenger vehicle in the loop area, described in the section, longer than is necessary for the loading and unloading of passengers but not to exceed more than three minutes, and prohibits the standing of

commercial vehicles longer than is necessary for the reasonably expeditious loading or unloading and delivery and pick-ups of materials, but not longer than thirty minutes on any public street or alley within the described area, on any day except Sundays, New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day.

The holidays here enumerated are the six holidays which are universally observed in Chicago. Courts, banks, public offices, stores and business houses generally are closed on those days. On such days traffic in the loop is at a minimum.

There are other holidays which are legal in Illinois but which are not so generally observed as to permit the suspension of traffic regulations on those days. On such days as Lincoln's Birthday, Washington's Birthday, Good Friday, Columbus Day, except that the courts, banks and some public offices are closed, business generally is carried on in the loop as it is normally and requires that traffic regulations remain in effect on those days.

It is unfortunate that your friend did not know which holidays were included in the definition of that term, or on which holidays parking in the loop is not in violation of section 27-127 of the traffic regulations.

SNOW REMOVAL PARKING ORDINANCE

(No. 12123—Alderman, 5th Ward—A. F. G.—June 4, 1957.)

In your letter of May 21, 1957 you state your subcommittee is considering a proposed order on the non-enforcement of Section 27-126 of the Municipal Code of Chicago and request an opinion on the following question:

"Is any posting of signs required as a condition precedent to enforcement of City ordinances which prohibit or limit parking?"

Section 27-126 of the Code which your committee is considering is as follows:

"Limited night and winter parking. It is unlawful to park any vehicle for a period of time longer than three minutes for loading and unloading of passengers or thirty minutes for loading and unloading of property at any place, whether designated as a loading zone or not so designated, on any through street or any street upon which a street railway or motor bus is operated, between the hours of 4:00 o'clock a.m. and 7 o'clock a.m. of any day of each year, or at any time after snow begins to fall and for a period of 8 hours after snow stops falling, if the snow on the street exceeds 1 inch in depth, provided that said 8-hour parking restriction shall continue during snow removal operations until completed. The commissioner of streets and sanitation has power, subject to the approval of the city council, to designate by appropriate signs any place on any other street where no parking is permitted during the hours and under the conditions described in this section."

Section 25 of the "Uniform Act Regulating Traffic on Highways" is as follows:

"Section 25. Provisions of act uniform throughout state. The provisions of this Act shall be applicable and uniform throughout this State and in all political subdivisions and municipalities therein, and no local authority shall enact or enforce any ordinance rule or regulation in conflict with the provisions of this Act unless expressly authorized herein. Local authorities may, however, adopt additional traffic regulations which are not in conflict with the provisions of this Act."

Section 26 of the same Act enumerates eight cases in which local authorities in respect to streets and highways under their jurisdiction may legislate. Subdivision (1) authorized local authorities to regulate "the standing or parking of vehicles".

Subparagraph (b) of that section reads as follows:

"(b) No ordinance or regulation enacted under subdivisions (1), (4), (5), (6), (7), or (8) of this section shall be effective until signs giving notice of such local traffic regulations are posted upon or at the entrances to the highway or part thereof affected as may be most appropriate."

In view of the foregoing, it is our opinion the provisions of section 27-126 of the code are not effective unless signs are posted as provided in said paragraph (b).

SIGN REQUIREMENTS FOR PARKING REGULATIONS

(No. 12139—Subcommittee on Traffic and Public Safety—J. C. M.—July 17, 1957.)

In your letter dated July 15, 1957, you state that the Subcommittee, as a matter of emergency, has directed you to request an opinion from the Corporation Counsel as to whether or not signs are required as a condition precedent to enforcement of the following city ordinances which prohibit or limit parking:

- | | |
|----------------|--|
| Section 27-122 | (1). At intersections |
| | (2). At crosswalks |
| | (5). Within 50 feet of a traffic signal |
| | (6). Within 20 feet of a crosswalk |
| | (7). Within 15 feet of a fire hydrant |
| | (9). In front of a driveway |
| | (10). On any sidewalks |
| | (12). Double parking |
| | (14). Within 50 feet of a railroad crossing |
| | (17). Under a fire escape |
| | (18). On a railroad track or within 10 feet of it. |
| 27-119 | More than 12 inches from a curb, or on a diagonal. |

This inquiry was probably brought about by reason of an opinion rendered by this office on June 4, 1957, interpreting Section 26 of the "Uniform Act Regulating Traffic on Highways" (Chapter 95½, Par. 123) which authorizes municipalities to make regulations in specified categories upon posting of notices.

You are advised that Chapter 95½, Par. 187 prohibits parking as to the matters contained in Section 27-122 (1), (2), (5), (6), (7), (9), (10), (12), and (14), and the latter, we think, would include (18).

Section 27-119 is covered by Chapter 95½, Par. 188.

We find no provision in the statute relating to parking under a fire escape, which is item (17) in Section 27-122.

By reason of the statutory provisions, it is not necessary for the City of Chicago to post signs relating to those prohibitions.

Where fire escapes are constructed, in whole or in part, over a public way that is used for vehicular traffic, it would be proper to amend Section 67-16.1, subparagraph (c), to require the owners of the premises to attach to such fire escapes a metal sign providing that parking under the same is prohibited. In this way the Police Department and the Department of Streets and Sanitation could be relieved of the obligation of posting signs relating thereto.

TOLL PLAZA SIGNALS

(No. 12184—*Commissioner of Public Works—A. F. G.—November 25, 1957.*)

Your letter of November 18, 1957 is as follows:

"In connection with the operation of the Calumet Skyway, a question has been raised concerning possible legality of police action on this facility.

At the toll plaza we are installing traffic signals which will have a red indication until the proper toll is paid, at which time the light will turn green. If any motorist fails to deposit the proper toll and proceeds through this red light, an alarm will sound and an auxiliary red light on top of the traffic light will flash. This traffic signal is a conventional traffic unit except that there is no amber light.

In order to properly control toll violations, it would be extremely beneficial if anyone going through the red signal could be arrested on a traffic violation. I would appreciate your ruling on this point and advice as to any council action that might be required to provide police with necessary authority on this toll facility."

The elevated structures erected over existing streets, and structures erected over land acquired by the City for skyway purposes are streets, and all laws and ordinances regulating streets are in force and effect on the skyway. The police have authority to arrest violators of traffic control signals erected on the public streets and the traffic signals installed on the skyway are subject to the same police authority.

We do not believe that any further council action is necessary to empower the police to arrest violators of the traffic signals installed by you on the skyway.

SPEED LIMITS

(No. 12202—*Commissioner, Streets and Sanitation—R. F. S.—February 13, 1958.*)

In your letter of January 29, 1958, you request an opinion on the following question, "Is an ordinance required for the sections of streets and highways within the city under state jurisdiction that the state has given approval to us to post at variance to the statutory speed limits based on our speed studies?"

Chapter 95½, section 147 of the Illinois Revised Statutes relates to alteration of speed limits by local authority. The first paragraph relates to the County Board and the statute gives it the authority to change absolute maxi-

imum speed limits on *all highways and streets* for which it has maintenance responsibility *which are not under the jurisdiction of the Department* (State Department of Highways). Paragraph "C" which relates to "cities" must be read in the light of the introductory paragraph. The meaning of paragraph "C" so read would be that the city has the same power as the County Board in regard to highways over which the city has maintenance responsibility which are not under the jurisdiction of the Department. Phrased differently, neither the county nor the city has authority to alter the absolute maximum speeds on streets and highways which are under the jurisdiction of the Department and this includes those segments of the streets and highways which are within the corporate limits of the city.

The streets which are under the jurisdiction of the Department, which are the subject of your inquiry, are governed by Chapter 95 $\frac{1}{2}$, section 146.01. That section reads " * * * The Department shall determine and declare by regulations a reasonable and safe absolute maximum speed limit * * * A limit so determined and declared becomes effective and suspends the applicability of the limit prescribed in section 49 of this act when appropriate signs giving notice of the limit are erected."

It is our opinion that an ordinance *is not* required in order to give effect to a change in the absolute maximum speed limit when the street or highway involved is under the jurisdiction of the Department. Section 146.01 mentioned above controls streets and highways under the Department and it does not require an ordinance.

There are many cases to effect that cities may exercise police power concurrently with the State. *Aliotta v. City of Chicago*, 59 N. E. 2d 829; 389 Ill. 418. Hence authority could be found in order to justify the city in passing an ordinance should it desire to do so.

The conclusion of this opinion is that an ordinance is not required for the sections of streets and highways within the city under state jurisdiction on which the state has given approval to the city to post at variance to the statutory speed limit.

PARKING AT UNEXPIRED METER

(No. 12299—Alderman, 40th Ward—A. F. G.—October 6, 1959.)

Your letter of October 1, 1959 is as follows:

"I would appreciate knowing whether a police officer is authorized to ticket an automobile parked opposite a meter which shows unexpired time on it when the driver arrives, and when the driver does not then put additional money in the meter."

The section of the Traffic Regulation of the Municipal Code of Chicago applicable to the foregoing situation reads as follows:

"27-330. Deposit of Coin.) When any vehicle shall be parked in any parking-meter zone the operator of such vehicle shall, upon entering the parking space, immediately deposit or cause to be deposited a coin of the United States in such parking meter, of the denomination indicated, and put such meter in operation. Failure to deposit such coin and put the meter in operation shall constitute a violation of this ordinance."

This section is clear and unambiguous and a police officer is authorized to ticket a car parked in the manner cited in your letter. However, in many cities where parking meters are in use, the practice prevails of permitting a new occupant of a meter space to use up the unexpired time shown on the meter at the time he enters it without the deposit of a coin.

U TURNS AT INTERSECTION

(No. 12311—Chairman, Committee on Traffic and Public Safety—
A. F. G.—December 30, 1959.)

Your letter of December 16, 1959 is as follows :

"At a meeting held this date, the Committee on Traffic and Public Safety directed that you be requested to submit an opinion as to whether the Bureau of Street Traffic has the power to permit the erection of a 'U TURN' sign at any intersection without amending the existing ordinance."

Inquiry at your office disclosed that the problem before your committee involved "u turns" on a boulevard.

The section of the code which regulates "u turns" on boulevards is Section 27-216 and reads as follows :

"27-216. Limitations on turning around on boulevards.) It shall be unlawful for the operator of any vehicle to turn such vehicle in any boulevard so as to proceed in the opposite direction unless appropriate signs are erected to permit such turns."

Section 27-217 prohibits "u turns" in the loop district bounded by Lake Street, Van Buren Street, Franklin Street and Wabash Avenue, unless signs are erected to permit such turns, and authorizes the commissioner of streets and sanitation to determine those places in said area where such turns may be permitted on the roadway and to erect appropriate signs giving notice thereof.

We assume that when the city council prohibited "u turns" in these two areas except where signs are posted permitting such turns, the council intended that on all other streets in the city "u turns" would be permitted without the erection of signs :

Section 27-215 reads as follows :

"Section 27-215. Limitations on turning around. The driver of any vehicle shall not turn such vehicle so as to proceed in the opposite direction, upon any street or part of any street where such turns are permitted, at any point closer than one hundred feet to any street intersection nor when such turn cannot be made in safety and without interfering with other traffic."

It will be noted that the prohibition against "u turns" within one hundred feet at an intersection in the foregoing section applies only on streets on which such turns are *permitted*. On boulevards no "u turns" are permitted except when authorized by the commissioner of streets and sanitation and unless appropriate signs are erected to permit such turns.

In the case before your committee the presence of a median strip prevents the making of such turns except at an intersection. It is our opinion that when special conditions make it advisable the commissioner may authorize such turns at an intersection when appropriate signs are erected authorizing such turns.

DESIGNATION OF SCHOOL ZONES

(No. 12337—*Deputy Commissioner Streets and Sanitation*—J. C. M.
—May 3, 1960.)

In your letter of August 13, 1959 you inquire as to the effect of House Bill 65 which provides for a speed of 20 miles per hour in school zones.

This Act reads as follows:

"50.05. Special speed limit while passing schools.) No person shall drive a motor vehicle at a speed in excess of 20 miles per hour while passing a school zone or while traveling upon any public thoroughfare on or across which children pass going to and from school during school days when school children are present.

"This Section shall not be applicable unless appropriate signs are posted upon streets and highways by the Department, township, county, park district, city, village or incorporated town wherein the school zone is located. Such signs shall have proper due warning that a school zone is being approached and shall indicate the school zone and the maximum speed limit in effect during school days when school children are present."

All the provisions of the Uniform Traffic Act regulating traffic on highways must be read together and reconciled whenever possible. While it may appear from Section 50.05 that any street upon which a child walks to go to school is considered a school zone, such construction would create a situation wherein every street in a municipality would be within a school zone and, therefore, the maximum speed in the municipality would be restricted to 20 miles per hour. However, when giving consideration to Section 50 of the Act, which gives a discretion to municipalities to determine the maximum and minimum rates of speed of motor vehicles, we come to the conclusion that, in view of the fact that the posting of signs is the controlling feature under the statute, the municipal authority shall determine the perimeter of the school zone and post notices as provided by said statute. Such signs shall give proper warning that a school zone is being approached and shall indicate the school zone and the maximum speed limit in effect during school days when school children are present.

It is our opinion that it is the duty of the City of Chicago to designate and declare by the posting of signs the school zone wherein the 20 mile per hour maximum limit of speed is applicable under the statute.

SECTION III

MANAGEMENT OF THE MUNICIPAL CORPORATION

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CHAPTER X — FINANCE

A. APPROPRIATIONS AND TAXES

DELINQUENT WATER CHARGES

(No. 11793—Commissioner of Water and Sewers—W. J. K.—March 3, 1954.)

We have your letter wherein you set forth the addresses of premises, hereinafter described, where water charges have been delinquent for a considerable period of time. You state that you have exhausted all possible means to collect these delinquent accounts which are being carried on your current ledgers. You request our opinion as to whether or not these delinquent water accounts may be suspended or abated.

The provisions of the Municipal Code of Chicago, relating to delinquent water suspense accounts, are found in section 8.1-11 which provides as follows :

"The commissioner of water and sewers shall cause to be opened in the general ledger of the bureau of water two accounts, to be known as the suspense accounts number 1 and number 2. In suspense account number 1 shall be shown the totals of all of the accounts and items which may be ordered transferred under any section relating to frontage rates accounts; and in suspense account number 2 shall be shown the totals of all the items which may be ordered transferred under any section relating to meter rates accounts.

The commissioner of water and sewers shall provide suitable detailed ledgers, in which the detailed accounts of suspense accounts number 1 and number 2 shall be kept and shown. All accounts affected by order of court and recommendations of the corporation counsel shall come within the scope of this section."

The provisions of the code, relating to the abatement of delinquent water accounts, are set forth in section 185-41 which provides in part as follows :

"Wherever the water supply of any building, structure or premises is shut off, and the premises become vacated and remain vacated for a period of sixty (60) days; or where any building or premises is in an untenable condition for 60 days; and where no water is being used for said period, and where the records of the Water Collection Division of the Bureau of Water of the Department of Water and Sewers verify the extent of such conditions; an abatement of all charges shall be made for the time such premises are vacated."

We will now consider, in the light of these sections of the Code, each delinquent account in the order set forth in your communication.

1.

With reference to the account for premises at 3520 W. 62nd Street you state:

"There is due from said premises the amount of \$57.54 for the period November 1, 1946 to November 1, 1953. This office has attempted to make collection by shutting off the water, and for the past five years the water

has been continuously shut off and none supplied to the premises. The place, however, has been occupied by a widow and her son for the past ten years who seem to be using water wherever same can be obtained throughout the neighborhood."

Section 185-41 deals only with cases where the premises have become vacant and remain vacant for a period of sixty days or more or where the premises are in an untenable condition for such a period. It appears that these premises are presently occupied by a widow and her son. Manifestly, section 185-41 is not applicable to this account.

However, it further appears that you have exhausted all possible means of collecting this account. Section 8.1-11 expressly provides for the creation of suspense accounts in your department. This section further provides that, upon recommendation of the corporation counsel, delinquent accounts may be transferred to suspense accounts. In view of the fact that this account in the sum of \$57.54 cannot be collected at the present time, it is our recommendation that it be transferred to the proper suspense account.

2.

With reference to the account for premises at 2214 N. Clybourn Avenue you state:

"There is due from said premises the amount of \$85.19 accrued from November 1, 1950 to May 1, 1953. The building was in part destroyed by fire in December 1952, being partially occupied up until the time of the fire. The building is now untenable."

In this case the building was destroyed by fire in December 1952. Obviously the premises became vacant at that time and have remained vacant for a period of sixty days. Therefore, the provisions of Section 185-41 are applicable to this case. It is our recommendation that part of the delinquent account in the sum of \$85.19 which accrued after the time the building was destroyed by fire in December 1952 be abated.

In your letter you state that you have exhausted all lawful means of collecting this account. Section 8.1-11 provides for the transfer of delinquent accounts to suspense accounts upon recommendation of the corporation counsel. It is therefore our recommendation that the remaining part of the delinquent account in the sum of \$85.19, which accrued prior to the time the building was destroyed by fire in December 1952, be transferred to the proper suspense account.

3.

With reference to the account for premises at 5554 Lexington Street you state:

"There is due from said premises the amount of \$15.50 for the period November 1, 1952 to May 1, 1953. The building at the present time is untenable—same is mostly wrecked and water is shut off. The back tax accrued while trespassers were in possession."

It appears in this case that the delinquent account in the sum of \$15.50 accrued while trespassers were in possession of the building when it was partly wrecked. It further appears from your communication that the building has become vacant and has remained vacant for a period of more than sixty days. Under these circumstances this delinquent account comes within the purview of section 185-41 authorizing the abatement of delinquent accounts. It is therefore our recommendation that this delinquent account in the sum of \$15.50 be abated.

4.

With reference to account for premises at 12826 S. Marquette Avenue you state:

"There is due from said premises \$140.06 back tax for the period May 1, 1933 to November 1, 1953. Reports show no water fixtures in the above building. They were all removed over two years ago—pipe cut off at street. There is an old man living here who gets drinking water wherever he can. Building is not torn down but is in a dilapidated condition."

Section 185-41 authorizes the abatement of delinquent accounts for premises which have become vacant and remain vacant for a period of sixty days. In this case it appears that while the building is in a dilapidated condition, it is not vacant in that an old man is living on the premises. Obviously section 185-41 which authorizes the abatement of delinquent accounts is not applicable here.

However, it further appears that you have exhausted all possible means of collecting this account. Section 8.1-11 expressly provides for the creation of suspense accounts in your department. This section further provides that upon recommendation of the corporation counsel, delinquent accounts may be transferred to suspense accounts. In view of the fact that this account in the sum of \$140.06 cannot be collected by you at this time, it is our recommendation that it be transferred to the proper suspense account.

5.

With Reference to the account for premises at 7308 Sheridan Road you state:

"There is due the sum of \$136.38 for the period May 1, 1939 to November 1, 1953. Front building torn down about fifteen years ago. A 24' garage is still at rear of lot. No water is being used and no fixtures in said garage."

In this case the delinquent account accrued during the period when the front portion of the building was torn down and hence, the building became vacant and has remained vacant for a period of more than sixty days. Section 185-41 authorizes the abatement of delinquent water charges under such conditions. It is therefore our recommendation that this delinquent account in the sum of \$136.38 be abated.

RETAILERS OCCUPATION TAX

(No. 11953—P. P.—J. F. G.—September 14, 1955.)

Your letter of September 7, 1955, addressed to the Office of the Comptroller, Bureau of Excise Taxes of the U. S. Treasury Department has been referred to the City Comptroller of Chicago for official disposition. The subject matter of your inquiry is an application for exemption from "City Sales Tax in the City of Chicago."

Accompanying your letter are photostatic copies of opinions from the Treasury Department in Washington that your organization is exempt from Federal Income Tax and from the excise tax imposed by the City of New York pursuant to New York City's sales tax law.

The City of Chicago does not impose a sales tax. It is permitted by law to impose a tax upon persons engaged in the business of selling tangible personal property at retail in the City of Chicago. It is known as the Municipal Retailers Occupation Tax. Under the State Constitution of Illinois, neither the

State nor any municipality may impose what is generally known as a sales tax. The Retailers Occupation Tax is in the nature of a license tax upon persons engaged in the retail business. There are no exceptions or exemptions allowed to any person in the retail business in the City of Chicago. It is the practice, however, for retailers to pass the tax on to consumers as part of the cost of the retailers' business.

WHEEL TAX FOR STREET IMPROVEMENT

(No. 11995—*Superintendent of Streets and Sanitation—J. E. S.—December 30, 1955.*)

Your recent letter requested an opinion as to the legality of using Vehicle Tax Funds to pay for the grading of streets or alleys which have never been improved with a pavement.

Standing alone, neither the Statutes of the State of Illinois nor the ordinances of the City of Chicago prohibit the use of such funds for grading.

Thus, Section 32a, Chap. 95½ Ill. Rev. Stat. 1955 allows expenditures for the purpose of improving, paving, repairing or maintaining the streets and other public roadways within the municipality, and Chap. 29-12 of the Municipal Code allows expenditures for paying the cost of street or alley improvement, repair and maintenance.

However, Chap. 29-12 further provides that such revenue shall be used in the manner provided for in the annual appropriation ordinance or in such other manner as the City Council may by ordinance direct. The proposed annual appropriation ordinance for the year 1956, printed in the Journal of Proceedings of the City Council on December 12, 1955, provides on page 1850 thereof that the Vehicle Tax Funds may be used for labor, material, truck hire, equipment and miscellaneous expense in connection with *cleaning and repairing permanent pavements*, and *oiling, screening and repairing macadam pavements*, either by contract or by City day labor. The proposed ordinance does not, in the foregoing or otherwise, provide for the expenditure of Vehicle Tax Funds for grading unimproved streets and alleys. Assuming passage of the ordinance as printed, the City Council would be, throughout the year 1956, unable to amend said ordinance to provide for grading or unable to appropriate additional funds therefor. Section 22-1, Chap. 24, Ill. Rev. Stat. 1955.

It is the opinion of this office that, again assuming the passage of the annual appropriation ordinance as printed, it will not be legal and proper to use Vehicle Tax Funds for the grading of unimproved streets and alleys.

UTILITIES TAX — FEDERAL RESERVE BANK

(No. 12001—*Asst. General Counsel, Federal Reserve Bank—J. F. G.—January 17, 1956.*)

Your letter of January 10 addressed to the City Comptroller has been referred to this department for consideration.

You claim exemption from the city's gross receipts tax on persons engaged in the business of selling electricity. The tax is not upon the consumer or upon the use or consumption of electricity.

It appears, therefore, that by Section 7 of the Federal Reserve Act you are exempt from the gross receipts tax on electricity resold to your tenants, but the tax paid by Commonwealth Edison Company for electricity furnished to the Federal Reserve Bank which is not resold, is passed on as a separate charge to the bank as a consumer, by virtue of Section 36 of the Illinois Public Utilities Act. The charge so passed on is not a tax imposed by the city ordinance. It is added to the utility rate for electricity furnished in the same way as the municipal rate of compensation for the use of streets, federal income tax and local ad valorem taxes are added in the rate without being so specified.

Hence, the Federal Reserve Bank is not exempt from the payment of the charge for the tax imposed upon Commonwealth Edison Company for electricity furnished to the bank for its own use or consumption.

NATIONAL BANKS SUBJECT TO UTILITIES TAX

(No. 12029—City Comptroller—J. F. G.—April 13, 1956.)

Reference is made to your correspondence with Continental Illinois National Bank & Trust Company on the above subject which is herewith returned.

The bank returned your forms of tax return for reseller of electricity, stating that such tax cannot be levied against a national bank. A copy of opinion by the bank's attorneys was attached stating, in effect, that an excise tax imposed by authority of the State is unconstitutional if the legal incidence of the tax falls upon a national bank.

On January 17, 1956, we wrote an opinion relating to the claim of exemption from the above tax by the Federal Reserve Bank of Chicago. Therein we held that the Federal Reserve Bank is not exempt from payment of the charge for the tax imposed upon Commonwealth Edison Company for electricity furnished to the bank for its own use or consumption but is exempt from the gross receipts tax on electricity resold to its tenants. This would seem to substantiate the claim of the Continental Bank. Although not so stated in our opinion, it was based upon our assumption that the Federal Reserve Bank Building is occupied principally for its banking functions, and that part of its building which is presently leased is fairly and reasonably necessary for the future use of the bank.

In 1942, the Supreme Court of Arizona held that a state did not have power to collect a sales tax on rentals received by a national bank from tenants of offices in a building owned by the bank, since such bank is an "instrumentality of the United States" and the tax does not come within the federal statute authorizing states to tax only its realty and its shares of stock. It does not appear from the report of this case that any part of the building subjected to the tax was occupied by the national bank. It appears that the bank acquired the building in the ordinary course of its banking operations, presumably in satisfaction of a debt. On that ground the judgment of the court can be justified. The federal statute permits a national bank to own and possess such realty for a period of five years from the time of its acquisition (*O'Neil v. Valley Nat. Bank of Phoenix*, 121 P. 2nd 646).

In *State v. Whitney Nat. Bank of New Orleans*, 179 So. 84, the Supreme Court of Louisiana, in the year 1938, reached a different conclusion in a case involving a state tax on gross receipts from rents on office buildings. The bank claimed exemption as an instrumentality of the United States which is subject to the taxing power of a state only as the Congress of the United States specifically authorizes and permits, and that this tax is not such a tax as is so authorized or permitted. The bank claimed that the leasing of

surplus space for offices in a bank building is incidental to and inseparable from the conduct of its business as a national bank, and consequently cannot constitutionally be made the subject of the tax in question.

The court held that the exemption of instrumentalities of the state or federal government from taxation does not extend to anything outside of governmental functions and that immunity from taxation does not apply where the tax at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct; that the operation of office buildings is not the exercise of a power necessary to carry on the business for which national banks are established, especially where the rentable space of such office buildings are of such proportions that the bank's business cannot reasonably be expected to expand to require their use for banking business.

We believe that the decision of the Louisiana Supreme Court is sound and supported, in principle, by ample authority to govern national banks in Chicago. Each claim for exemption of a national bank should be considered with due regard to the potential use of its buildings for its banking operations.

MUNICIPAL UTILITIES TAX

(*No. 12126—P. P.—J. F. G.—June 7, 1957.*)

We have your letter of June 1, 1957, inquiring as to whether or not your congregation is subject to the municipal utility tax included on invoices for gas, electricity and telephone service.

The church is not exempt from payment of the charges added by the public utilities on account of the tax imposed upon them for the privilege of engaging in their respective businesses in the City of Chicago. The tax is not imposed upon the church or any other consumer or customer of the gas, electric or telephone companies. The economic burden of these taxes of course are borne by the ultimate consumers or subscribers. This is true of all taxes. The only difference between this tax and others, such as property taxes, franchise taxes and Federal income taxes is that the latter are hidden taxes which are passed on, while the city utility tax was passed on as a special or added charge, which includes not only tax imposed upon the public utilities but their overhead expenses.

The reason that this item is billed separately instead of being hidden in the gross bill as all other taxes are is that the State legislature and the State Public Utility Commission authorizes the separate billing so that the people of Chicago will know that the added charge is on account of the city utility tax.

UTILITIES TAX — DEDUCTIONS FROM GROSS RECEIPTS

(*No. 12132—City Comptroller—J. F. G.—July 1, 1957.*)

I have examined the report of Wolf and Company, Certified Public Accountants, dated May 6, 1957, on the returns of public utilities under their respective occupation taxes for the year ended December 31, 1956.

ILLINOIS BELL TELEPHONE COMPANY

The report affecting the above company shows the following questionable deductions from "gross receipts" (gross billings permitted by Comptroller) subject to tax at rate of 2%:

Interstate Messages

The report shows (Folio 4) that the company's interpretation of Section 23-113 of the Revised Cities and Villages Act is that the tax may not be imposed with respect to any transaction in interstate commerce. I assume that the amount of \$64,255,411.55 shown under this caption is revenue from interstate messages apportioned to intrastate service in connection with such messages originating in the city of Chicago. I assume also that the additions to gross revenue of \$1,061,532.18 shown on Folio 3 do not include any apportionment of revenue from interstate messages for intrastate service.

Section 23-113 above referred to provides :

"None of the taxes authorized by this Section may be imposed with respect to any transaction in interstate commerce or otherwise to the extent to which such business may not, under the constitution and statutes of the United States, be made the subject of taxation by this State or any political subdivision thereof;"

In my opinion the constitution and statutes of the United States permit the imposition of a State or local tax on transactions in interstate commerce involving intrastate service and there is nothing in Section 23-113 or in the ordinance relating to the subject which relieves the company from its utility tax burden on revenue which is fairly apportioned to the service rendered within this State. *Western Live Stock v. Bureau of Revenue*, 82 L. Ed. 823, 825; *Coverdale v. Arkansas-Louisiana P. L. Co.*, 82 L. Ed. 1043, 1050; *Kentucky Natural Gas Corp. v. Public Service Com.*, 28 F. Supp. 509, 513 (affd. 119 F. 2d 417); *Columbia River Bridge Co. v. State* (Wash. 1955) 282 P. 2d 283; *Wieman and Ward Co. v. City of Pittsburgh* (Pa. 1955) 113 A. 2d 719.

Audio and Video Transmissions

The amount of \$323,362.02 deducted under this caption also involves interstate commerce. Assuming that this amount is revenue apportioned to intrastate service originating in the city of Chicago, my opinion is that it is not deductible.

Foreign Exchange and Mobile Telephone

It is not clear whether the deduction of \$4,339,398.68, or any part thereof under this caption, is for messages originating in the city of Chicago or for any service rendered in the city of Chicago in connection with such messages. The ordinance imposing the tax bears no relation to the location of the subscriber. The tax is imposed upon revenue derived from messages originating in Chicago and all services rendered in connection with such messages.

Nonmessage Transmission

It appears that the deduction of \$638,425.49 represented billings for leased circuits used for the transmission of messages by lessees who received compensation for such services or facilities. Such revenue is excluded by definition of "transmitting messages" in the ordinance. ADT and any other lessee of the company's facilities who transmit such messages is a "Tax payer", as defined in the ordinance, and is subject to the tax on the gross receipts from the transmissions of such messages and for all services rendered in connection therewith.

Extra Listings

The deduction of \$426,540.63 for additional listing is revenue from advertising in telephone directories. It is revenue from furnishing service or

facilities of the company in connection with the transmission of messages originating within the city and is subject to the gross receipts tax. *Illinois Bell Tel. Co. v. Miner*, 11 Ill. App. 2d, 44.

Chicago-Served Phones Outside Illinois

The deduction of \$270,525.31 made for billings for phones located outside Illinois but served by the Chicago area office seems to be based on the percentage of interstate messages originating in Chicago. If that is the fact, it should be treated in the same way as other interstate messages on the assumption that the amount deducted represents revenue apportioned to the service rendered within this State. However, if this revenue is from messages originating at phones or terminals located outside Illinois, all revenues derived from such messages and from services rendered in connection therewith is deductible, and not merely 88% thereof which were interstate transactions. The fact that the deduction was made for that percentage of the billings indicates to me that such messages originated at phones or terminals located in Chicago.

Services to Be Rebilled by The Western Union

The validity of the deduction of \$88,742.95 representing billings to The Western Union under contracts No. 1 and 2 cannot be determined without examination of said contracts. If the amount of this deduction is reported by The Western Union in its returns, the city would not be entitled to double the tax for the same messages and services. The question in my mind is whether this deduction represents revenue of the company for its service to The Western Union for relaying or forwarding the contents of a telegraph message transmitted or to be transmitted by The Western Union or for any service in connection with the transmission of such telephone messages.

Intrastate Services Billed to the U. S. Government

The deduction of \$1,133,196.73 under this caption is based upon the opinion of the company that receipts from U. S. government are not taxable under the provision of the city ordinance. The report indicates that the company charges the tax to the U. S. government. It appears that these charges are collected, but the company has approval of the Illinois Commerce Commission not to account to the city for the tax. The indicated reason for such failure to pay the tax is that the charges are offset by the company's inability to collect the tax on revenue from coin box telephones.

The tax imposed by the ordinance is not a tax on "receipts", nor is it a tax on the subscriber or user of the company's service, such as the U. S. government or persons using coin box public telephone facilities. It is a tax on all persons engaged in the business of transmitting messages by means of electricity, measured by the gross receipts from such business. The fact that the company has no practical means of passing on the economic burden of the tax upon those who use coin box telephones does not warrant the company in withholding the tax for transmission of messages billed to the U. S. government. The Illinois Commerce Commission has no power to regulate the company's tax obligations or to interfere with the collection of a local tax imposed by the city.

Telegraph Commissions

The deduction of \$82,860.83, representing commissions for handling telegraph message charges for The Western Union, is justified by the company that this revenue is for a service which is unrelated to the business of transmitting messages by telegraph or by telephone. I do not concur in that statement of the report. It is either the company's revenue from the business of transmitting telephone messages or a non deductible expense of The Western Union's business of transmitting telegraph messages. The per-

minent questions which must be resolved are whether the amount involved is derived from the transmission of messages originating in the city and whether all or any part of said amount is for intrastate service charges.

Directory Advertising and Sales

The deduction of \$8,172,463.28 for advertising, listings, sales, etc. in the Red Book should be disallowed. This revenue, in my opinion, is from furnishing service or facilities of the company in connection with the transmission of messages and is subject to the gross receipts tax, as in the caption of Extra Listings heretofore discussed.

Tax Returns of Other Utilities

I will continue my study of Wolf and Company's report on tax returns of The Western Union Telegraph Company, Commonwealth Edison Company and The Peoples Gas Light and Coke Company, and will consider the report on each of said companies by separate letters.

DEDUCTIONS FROM GROSS RECEIPTS — COMMONWEALTH EDISON

(No. 12136—City Comptroller—J. F. G.—July 12, 1957.)

Having considered the report of Wolf and Company, Certified Public Accountants, dated May 6, 1957, upon the above subject, I cannot concede the validity of the following exclusions and deductions:

Service Repairs Billed

The deduction of \$221,039.54 should be disallowed for the reason that the revenue from this source is included in the definition of gross receipts as a service rendered in connection with the distribution and sale of electricity. The tax is not limited by the law or ordinance to gross receipts from supplying electricity. It is imposed upon persons engaged in that business and is applicable to all services rendered in connection with the supply of electricity. The company chooses to repair customer owned equipment for compensation to condition the equipment for consumption of electric energy and is properly one of the incidental functions of the business of supplying electricity.

Appliance Sales, Etc.

Revenue from this source includes an item of \$128,065.03 of miscellaneous resales which was not included in the company's returns of gross receipts. It is not quite clear whether this item covers resale of appliances subject to the Retailers Occupation Tax. If so, it was properly excluded from the taxpayer's returns; otherwise more information is necessary to determine the validity of this exclusion.

Payroll deduction on account of sales of appliances amounting to \$146,635.33 should be disallowed. By definition, gross receipts must be determined without any deduction on account of costs of labor or any other expense whatsoever. It appears that the cost of appliances sold and the expense of selling, delivery, installation, repair, etc., exceeded the revenue from such sales and this loss was included in the company records under "Sales Promotion Expense". Undoubtedly this expense is for the promotion of the sale of electricity.

Jobbing and Contract Work

Exclusion of revenue from this work of \$105,305.26 should be disallowed for the same reason that revenue from service repairs billed should be disallowed.

Billings to CTA for Maintenance, etc.

Revenue from this source amounting to \$63,269.85 is from services rendered in connection with the distribution and sale of electricity and should be included in the company's returns.

Credit to Municipal Compensation

The deduction of 4% of the gross operating revenue of the company from the 5% tax on the gross receipts is explicitly and clearly provided in Section 132-21 of the Code (Section 6 of the Tax Ordinance). Section 6 as originally drafted provided for a credit against the 5% tax of accrued compensation to the city based on *gross receipts*, as defined in the ordinance. It limited the credit to 4% of the revenue from sales of electricity for use or consumption, and not for resale. Under its special city franchise, the company is required to pay compensation on *sales of electricity for resale* as well as such sales for use or consumption, and is entitled to deduct the tax liability from the amount of compensation paid to the city.

The company refused to consider the fact that its sales of electricity for resale are exempt from the tax, and insisted on strict compliance with its franchise which would have permitted the company to pay nothing under the franchise, and pass on the 5% tax and incidental costs to each customer purchasing electricity for use or consumption. In these circumstances, the city council was forced to accede to the company's demand for a credit on *gross operating revenue* instead of on *gross receipts*.

Before the proposed ordinance was so amended, I advised the Mayor of the double credit on gross receipts from the resale of electricity supplied by the company.

DEDUCTIONS FROM GROSS RECEIPTS — PEOPLES GAS CO.

(No. 12137—City Comptroller—J. F. G.—July 15, 1957.)

The report of Wolf and Company, Certified Public Accountants, dated May 6, 1957, upon the above subject, shows net taxable receipts of \$98,674,139.13 and the tax at 5% of \$4,933,706.97 to be correct with the following exceptions:

Servicing Customers' Installations

The sum of \$204,615.19 of gross receipts from this service was not included in the taxpayer's returns because the company considers this revenue nontaxable on the ground that the same services may be obtained elsewhere from persons not engaged in the business of supplying gas. The tax is not limited by the law or ordinance to gross receipts from supplying gas but includes all services rendered in connection with such business. The company has indicated that these services are carried on to maintain the good will of its customers. It should be added that these services keep the equipment in condition for consumption of gas and are properly incidental functions of the business of supplying gas.

Meter Rental

The company has excluded from its returns gross receipts of \$1,392.40 from this source which, in my opinion, is directly related to the purchase and consumption of gas by the company's customers and should have been included in the taxpayer's returns.

Sale of By-Products and Residuals

The revenue of \$1,726,667.36 from this source was properly excluded from the taxpayer's returns, but not for all the reasons assigned by the company. Gross receipts from sales made to customers outside Illinois which are not subject to the Retailers Occupation Tax, as well as revenue from sales made within the city, are excludable because they are not derived from furnishing gas for use or consumption, nor from services rendered in connection therewith. These sales are not made or confined to the company's customers, as gas consumers, and the question whether such sales are interstate or intrastate transactions is not involved.

Taxes Collected and Held by Company

It appears that the company has charged its customers and collected \$172,977.29 on account of gross receipts after January 1, 1956, based on meter readings taken prior to that date. The company has set up on its books the amount collected as a liability to its customers. The company is of the opinion that the tax collected should be refunded to its customers. I concur in that opinion, and the City Comptroller should advise the company that pursuant to agreement between the city and all taxpayers under the ordinances relating to the distribution of gas and electricity passed December 1, 1955, the provision imposing the tax was interpreted to apply to meter readings after December 31, 1955.

Note:

Revenue of \$4,855,023.88 representing net sales of appliances were not included in the foregoing exceptions on my assumption that the term "net sales" was used in accord with its common meaning without deduction of any cost of selling, as in the "payroll deduction" claimed by Commonwealth Edison Company.

DEDUCTIONS FROM GROSS RECEIPTS —**WESTERN UNION TELEGRAPH**

(No. 12141—City Comptroller—J. F. G.—July 19, 1957.)

The report of Wolf and Company, Certified Public Accountants, dated May 6, 1957, on the subject of this opinion, indicates that little over 10% of the total revenue of the company from its business originating in Chicago was reported for taxation.

Of \$10,941,811.00 total revenues presumably originating in Chicago, deductions of \$9,685,169.00 for "Interstate and nonmessage transmission" was made and a tax of \$25,132.84 was paid on the balance of \$1,256,642.00 of gross receipts.

The report of the accountants states that the company does not segregate its interstate and intrastate revenue. The information in the report is insufficient for any separation or apportionment of the gross revenue of \$10,732,224.00 to gross receipts from intrastate operations in the transmission of messages originating in Chicago, including the furnishing of

services or facilities or both to persons in connection with the transmission of messages, as defined in Section 132-30 of the Municipal Code (Section 1 of the Tax Ordinance).

Interstate messages and services or facilities for the transmission of such messages are exempt by virtue of Section 23-113, Revised Cities and Villages Act, only "to the extent to which such business may not, under the constitution and statutes of the United States, be made the subject of taxation by this State or any political subdivision thereof."

The burden is upon the company to furnish a reasonable basis for separation of revenues, to comply with the ordinance. It is the duty of the company to keep books, records, etc., adequate to reflect the information which the taxpayer is required to report in the return to the comptroller.

It appears that of the total revenues of the company, \$209,587.00 was excluded from gross receipts subject to tax. The classifications of service so excluded relate to certain operations claimed to be nontaxable because the revenues therefrom are not from transmission of messages. These revenues likewise are not segregated between intrastate and interstate services or facilities. In addition to the necessity of segregating or apportioning such revenues, additional information is necessary to support exclusion of nontaxable revenues of the following classifications.

Errand Service Revenue

Does this item include delivery of or calls for messages transmitted or to be transmitted by means of electricity?

Express Order Charges

Does this involve payment of money or delivery of property by orders transmitted by telegraph?

Collection Service Fees

Is this service secured, performed or facilitated by use of the company's communication system?

News Service Ticker Revenue

Is this service between news gathering and dissemination agencies or a public broadcast service?

Time Service Revenues

What portion of this revenue is for clock service within enclosures occupied by subscribers and not for general public information?

Other Leased Plant Revenue

I am not familiar with the technical terminology of "tie line" or what function it performs in the communication system of the company, to determine whether this revenue is from charges for furnishing "services or facilities (whether owned or leased), or both, to persons in connection with the transmission of messages, where such persons do not, in turn, receive any consideration in connection therewith" as the term "transmitting messages" is defined by the tax ordinance.

If the persons to whom such facilities are furnished by the company receive a consideration for transmitting messages by teleprinter or by sound or signals over leased facilities the company should be required to furnish information of the names and addresses of all persons to whom the company furnishes such service or facilities so that they may be required to make returns and payments as taxpayers under the ordinance.

FINANCING PARKING FACILITIES

(No. 12242—Alderman 17th Ward—J. P. M.—July 21, 1958.)

We acknowledge your recent letter in which you request an opinion as to whether a special tax assessment may be levied against properties benefiting from the City of Chicago's off-street parking facilities in the vicinity of the Englewood Shopping Center.

Please be advised that in the case of *Village of Homewood v. Panos*, 57-C-3575, the Village attempted to construct an off-street parking facility financed by special assessment tax. The County Court held that the Village had no power to construct the facility for the following reasons:

1. Chapter 24, Section 84.1-1 sets out what a municipality may do under the Local Improvements Act and this section does not include construction or acquisition of off-street parking facilities.

2. Chapter 24, Section 52.1, Ill. Rev. Stats. (1957) specifically empowers municipalities to provide parking space for vehicles and how such facilities are to be financed. (Section 52.1-10 of Chapter 24 further provides that the City of Chicago may only use revenue bonds or revenues derived from such parking facilities under the Act set out.)

We have delayed answering this opinion to see whether or not an appeal would be taken from this County Court decision. We have been informed that the Village of Homewood is not going to appeal the ruling in this case.

Another point to consider is that on September 18, 1952, the City of Chicago, by virtue of the Parking Facility Revenue Bond Ordinance, sold revenue bonds, the proceeds of which were to be used to finance off-street parking facilities throughout the City. Among the projects provided for, the original ordinance is one concerning the construction and acquisition of parking facilities in the 63rd and Halsted Streets business district of the City.

Article V, Section 5.01 of this ordinance provides:

"The City covenants and agrees that so long as any of the Bonds remain outstanding, it will at all times establish and collect fees, rates and other charges for the use of all of its parking facilities (as defined herein), * * *

Article I, Section 1.01 of this ordinance defines "Parking Facilities" as:

"(n) 'Parking Facilities' means the off-street garage or garages, off-street parking areas and parking meters described herein as Initial Project designated as Project A-1, and all other parking facilities acquired or constructed, improved or extended with funds obtained through the issue of the City of Chicago Parking Facility Revenue Bonds, or income derived from the use of all such facilities, including property of any and every kind or description, whether real, personal or mixed as is used in connection therewith but excluding traffic lights or signals, police or traffic equipment used solely to regulate the flow and movement of automotive traffic as distinguished from the parking thereof."

Article IX, Section 9.01 provides that this ordinance may be amended only by the affirmative vote of two thirds of the bondholders.

Inasmuch as Parking Facility Revenue Bonds are outstanding, the City covenanted and agreed with the bondholders that it would collect fees for all its parking facilities as defined in the Parking Ordinance.

It is, therefore, the opinion of this office that because of the decision of the County Court and, more important, because of the Parking Facility Revenue Bond Ordinance, a special tax assessment may not be levied against properties benefiting from the City of Chicago's off-street parking facilities in the vicinity of the Englewood Shopping Center in lieu of revenue parking fees.

UTILITY TAX—AMERICAN DISTRICT TELEGRAPH

(No. 12249—City Comptroller—J. F. G.—September 2, 1958.)

Reference is made to your letter of June 3, 1958 transmitting brief of Eckhart, Klein, McSwain & Campbell, counsel for the company, upon the above captioned subject.

In our opinion to you of July 19, 1957, upon the subject of "Gross Receipts Tax Returns" of the Western Union Telegraph Company for the year ended December 31, 1956, we referred to a report of Wolf & Co., Certified Public Accountants, dated May 6, 1957, on Western Union Tax Returns, which covered revenue from its business included in the computation of the city tax and revenue excluded from said tax.

We then said the information in the report is insufficient to support exclusion of a number of items separately classified and claimed to be non-taxable. One of these was "Other Leased Plant Revenue", concerning which we advised you that if the lessee received a consideration for transmitting messages by teleprinter or by sound or signals over leased facilities, the company should be required to furnish information of the names and addresses of all persons to whom the company furnishes such services of facilities so that they may be required to make returns and payments as taxpayers under the ordinance.

The tax, as we pointed out, is not limited to gross receipts from messages transmitted. It is a tax upon the gross receipts of *persons engaged in the business of transmitting messages*, excluding only revenue from interstate messages which is not subject to apportionment or allocation for local service and interstate service. Non-message service *incident to the business in which the taxpayer is engaged*, i.e., "services or facilities (whether owned or leased), or both, to persons in connection with the transmission of messages where such persons do not, in turn, receive consideration in connection therewith," are subject to the city tax.

It should be clear that a lessee of Western Union wires or other facilities who uses them in the conduct of a business which requires the transmission of messages between stations of the lessee for its own business which is foreign to the business of transmitting messages for others, is not engaged in the business of transmitting messages, within the meaning of the ordinance.

It appears from Moody's Public Utility Manual, 1958, p. 1479, that American District Telegraph Company, (N. J.), and Teleregister Corp., formerly affiliates or subsidiaries of Western Union, have not been engaged in telegraph business since 1953, when Western Union sold its investment in these companies. A. D. T. is classified by Moody's as an industrial company (alphabetical index xi).

The Department of Revenue of the State of Illinois, by letter of July 2, 1958, enclosing copy of memorandum of opinion of July 19, 1955, concerning the status of A. D. T. Co., confirms Moody's report as to the nature of the present business of A. D. T. Co., and states that this company is selling a protection service, using the facilities of Western Union to communicate messages of its own to the police department or fire department, but is not transmitting the message of another or providing facilities for the transmission of messages. It is therefore not subject to tax liability under the State Messages Tax Act which is in all respects similar to the city tax ordinance. A copy of this opinion is herewith transmitted.

We have carefully considered the brief submitted to you by counsel for A. D. T. Co., and we have made an independent investigation of authorities upon this subject, from which we conclude that A. D. T. is not engaged in the business of transmitting messages and is not receiving any consideration for transmitting messages or furnishing any service or facilities in connection with the transmission of messages for compensation, subject to the city tax on the gross receipts in such business. However, the rental or other compensation paid by A. D. T. for the use of Western Union wires or other facilities are necessarily a part of the gross receipts of Western Union which are subject to the city tax.

FUNDS FOR A MEMORIAL

(No. 12263—Committee on Judiciary and State Legislation—A. F. G.—January 14, 1959.)

The assistant corporation counsel who attended the meeting of your committee on December 2nd reported to the corporation counsel as follows:

"In connection with the Resolution introduced by Alderman Prusinski for the drafting and introduction in the next General Assembly of a Resolution to provide for the erection of a memorial to Ignatz Jan Paderewski, the following questions are presented to the Corporation Counsel:

Can the City of Chicago appropriate money for the erection of such a statue without resort to the State Legislature?

What procedure was followed by the city the last time a statue was erected—(they indicated it was at Lincoln and Western Avenue?)

The committee requested an outline of the procedure which should be followed in order to achieve the purpose of this Resolution, including the proposed draft of a bill to submit to the General Assembly if it is necessary to resort to the General Assembly."

In an opinion of this office on the same subject matter dated March 11, 1929 and reported in Vol. XVII of the Opinions of the Corporation Counsel at page 605, we said:

"Your committee has requested of this department an opinion as to the right of the City to expend corporate funds for the purpose set forth in a resolution presented by Alderman Robert R. Jackson on January 5, 1929, and the propriety of making the payment out of a certain appropriation mentioned therein.

You forwarded the resolution in question with your letter. It is designed to provide for a memorial to celebrate the 150th anniversary

of the locating in Chicago territory of Jean Baptiste Point De Saible, who is said to be the first settled here. It directs that the Chairman of the Committee on Finance be authorized to provide a suitable memorial for the celebration of this occasion and to charge the cost thereof to Account 3-S-2.

The City Council has authority 'to control the finances and property of the corporation'; and 'to appropriate money for corporate purposes only'. Necessarily, these powers imply a wide discretion on the part of the Council as to what is and what is not a corporate purpose. It would not be an abuse of that discretion to apply money of the City to the purpose mentioned in the resolution.

In McQuillin on Municipal Corporations, the author mentions, among corporate purposes for which funds may be expended by a municipality, 'erection of a soldiers' and sailors' memorial arch as an expression of patriotism and to beautify a public place,' and in a note appended thereto states the following:

'It is well settled that reasonable use of public money for memorial buildings, monuments and other public ornaments, designed merely to inspire sentiments of patriotism or of respect for the memory of worthy individuals is for a public purpose.'

The same author refers, in this connection, to the case of *Barrow v. Bradley*, 190 Ky. 480, from which we quote as follows:

'Section 171 of our Constitution declares that, "taxes shall be levied and collected for public purposes." Unless therefore the proposed indebtedness is for a public purpose it is prohibited by the Constitution and would be invalid even if it had been proposed by the General Assembly of the Commonwealth.

'But it is so well settled now that the reasonable use of public money for memorial buildings, monuments and other public ornaments, designed merely to inspire sentiments of patriotism or of respect for the memory of worthy individuals, is for a public purpose that it hardly seems necessary to devote time to a discussion of this branch of the case. *Kingman v. Brockton*, 153 Mass. 255, 26 N. E. 998; 11 L. R. A. 123, and notes; 19 R. C. L. 722; Judson on Taxation, section 349.'

It would seem from the above that the use of corporate funds for the purposes of a memorial of the kind proposed is authorized, and it may be done on appropriate action of the City Council."

In view of this holding we are of the opinion the city can appropriate money for the erection of such a statue without resort to the legislature for authority.

The commissioner of public works advises us that the statue at Lincoln and Western Avenue was erected by citizens of that area out of private funds as a community project and was not erected by the city. A search of the records shows that there is no memorial in Chicago which was erected by the city out of public funds. Statues erected in the public parks were either authorized by the park district and paid for out of park funds or out of state appropriations for that purpose.

It is our opinion, therefore, the city council may authorize this memorial to Paderevski, and when an appropriation is made to cover its cost, may proceed with its erection.

TAX REFUND RESERVE INTEREST

(No. 12290—City Comptroller—J. F. G.—July 14, 1959.)

Reference is made to your letter of June 3, 1959, for an opinion as to the city's right to interest earned or which may be earned on investment of reserves in the county treasury for refund of city taxes paid under protest. Our attention has been directed to Ill. Rev. Stats., Chap. 102, relating to investment of public funds, and to Chap. 36, relating specifically to public funds in the custody or control of county treasurers in counties containing more than 150,000 inhabitants.

Chapter 102 applies to public funds belonging to or in the custody of any "public agency," meaning the State, counties, townships, municipalities and all other political subdivisions of the State. The "governing authorities" of each public agency control the investment of funds in its own treasury.

Chapter 36, par. 21, provides that all "county monies" shall be classified into separate funds. One is "Class A" funds, which are taxes and special assessments received by the county treasurer in his capacity as *ex officio* county collector and held by him pending distribution to the authorities entitled to receive them. Another is "Class B" funds, which are "monies belonging to the State or to any political or corporate division thereof, *except the county.*" So, all monies deposited by the county treasurer and within his custody are "county monies" until disbursed or distributed to the various taxing bodies. *The People v. Dime Savings Bank*, 350 Ill. 503 (1932).

In earlier cases our Supreme Court held that monies collected as taxes from the people of the whole State which had been apportioned and paid into treasuries of the various counties, for the use and benefit of several taxing bodies, *belong to the respective counties*, until segregated, separated or delivered to the proper representative or custodian of each municipality or political subdivision of the State. *The People v. Ohle*, 345 Ill. 403 (1931).

Chapter 36, par. 22, imposes a duty upon the county treasurer to deposit daily, in separate accounts in accordance with the classification set forth in par. 21, above, to the credit of the county treasurer in such bank or banks as shall have been selected and designated by the County Board. But there is no provision in the law for the segregation of each "Class A" or each "Class B" fund in a separate account. That is obvious from the provision in par. 29, which requires that interest received by the county treasurer or credited to him by any bank or depository must be reported and paid into the county treasury *for the benefit of the county, except that such portion of said interest as the total of school taxes of each school district bears to the entire amount of taxes collected, and not paid over, must be paid to such school district.* There is no similar provision for apportionment of interest to other taxing bodies.

We conclude, therefore, that all "Class A" funds and "Class B" funds are deposited in general "Class A" and "Class B" accounts, in the same way that the city and school funds were deposited, in the aggregate, although credited to each fund upon the books of the city treasurer. *The People v. Flynn*, 265 Ill. 414 (1914).

Chapter 120, par. 675 of the Revenue Act, provides that if any person shall desire to object to all or any part of a real property tax for any year, he shall first pay the tax. The payment shall be accompanied by written protest and the taxpayer must file objections in court with copy of his protest. If the court should order refund for any part of the taxes paid under protest, such refund shall be made by the collector "and the amount of such refund shall be deducted from the taxes of the taxing bodies whose

taxes were adjudged illegal, in the *same or a subsequent year.*" It is further provided:

"No protest, * * * shall be taken into account or be a cause of delay in the distribution of tax collections among the taxing bodies, but it shall be the duty of the collector to deduct from the taxes of any taxing body for any year the amount of any tax for any year held illegal by the final order of a court, and use the amount deducted to equalize the distribution."

Equitably the city is entitled to payment of all its share of taxes collected by the county treasurer, as *ex officio* county collector, before final judgment of the court and order for refund, although refunds to the taxpayers cannot be made before such judgment and order. *People ex rel. Brenza v. Edwards*, 513 Ill. 514, 523-524 (1953); *The People v. Lindheimer*, 370 Ill. 424, 429 (1939).

B. MANAGEMENT OF CITY FUNDS

WATER FUND FOR FLUORIDATION

(No. 11826—Alderman 36th Ward—J. C. M.—June 9, 1954.)

In your letter of June 8, 1954, you request our opinion as to whether the cost of establishing, maintaining and operating a system of fluoridation of the water supply of the City can be paid out of the Water Fund. Chapter 24, Par. 75-6, Ill. Rev. Stat. 1953, provides that all income received by a municipality by its system of water works, by its payment and collections of water rents or rates shall be applied (1) to the payment of principal and interest on bonds or money borrowed and used in the construction of water works, and (2) to the operating expenses thereof.

Preparing water for public and domestic use is part of the process of furnishing water for the City under its statutory powers. From the data that was available to us, it would appear that the mechanics of feeding fluorides to the water are no more involved than those used in adding chlorine to the water system and the use of fluorides in such water supply would have some value as a health measure.

It is our considered opinion that if the City of Chicago obtains the approval of the Department of Public Health of the State of Illinois as provided under Chapter 127, Par. 55.03, Ill. Rev. Stat. 1953, to add fluorides to the City's water system, the cost of the material, machinery and other devices pertinent to its use may be legally appropriated and charged to the Water Fund.

MOTOR FUEL TAX FUND FOR AN OVERHEAD CROSSING

(No. 11889—Alderman 33rd Ward—J. L. F.—March 29, 1955.)

You ask our opinion as to feasibility and legality of using Motor Fuel Tax funds for construction of elevated passenger walk (passerel) over the intersection of W. School St. and N. Elston Ave. Under Chapter 120, which is the Revenue Act of the State of Illinois of the Rev. Stat. of 1953, as amended, in paragraph 426½ thereof, it is provided, inter alia, as follows:

"* * * The remainder of any money allotted to the several municipalities shall be used for one or more of the following purposes:

* * * 10. The construction, reconstruction and maintenance of pedestrian subways or overhead crossings, under or over arterial streets or State highways in the municipality, provided the Department of Public Works and Buildings finds that traffic conditions warrant such constructions, reconstructions, or maintenance.
* * *"

We are therefore of the opinion, that in the light of the above statutory provisions, in the event the Department of Public Works and Buildings of the State of Illinois finds that traffic conditions warrant the construction of an elevated passenger walk over the intersection of W. School Street and N. Elston Avenue, either of said streets being an arterial street or State highway, it would be permissible under the law to construct the said elevated passenger walk, the cost thereof to be chargeable to such portion of the Motor Fuel Tax Fund as may be allocated to the City of Chicago.

PARKING METER FUNDS

(No. 11942 — Commissioner of Streets and Sanitation — D. N. — August 25, 1955.)

In your letter of August 17, 1955, you ask our opinion on the following questions:

1. Whether or not the Police Department is entitled to receive 30 per cent of all collections made from parking meters installed or to be installed in off-street parking areas under the Parking Facility Program.
2. Whether the Police Department would be permitted to police all meters installed in parking lots which are City owned.

Chapter 24 of the Ill. Rev. Statutes (1953), Section 52-1-1 reads as follows:

"Any Municipality is hereby authorized to: (a) acquire by purchase or otherwise, own, construct, equip, manage, control, erect, improve, extend, maintain and operate motor vehicle parking lot or lots, garage or garages, parking meters and any other revenue producing facilities necessary or incidental to the regulation control and parking of motor vehicles * * *."

Article 1, Section 1.01-N of Parking Facility Ordinance of September 22, 1953, C. J. 3143, reads as follows:

"'Parking Facilities' means the off-street garage or garages, off-street parking areas and parking meters * * *."

Article V, Section 5.06 of the above ordinance, C. J. 3157, provides as follows:

"The City hereby agrees that it will place in the Parking Revenue Fund beginning January 1, 1953 not less than 70 per cent of all parking meter revenue (as herein defined) and that not more than 30 per cent of all said parking meter revenues may be appropriated to the Police Department for enforcement of traffic regulations."

In view of the foregoing Statute and ordinance, it appears that the City of Chicago can install parking meters wheresoever it deems necessary for the parking of motor vehicles, and it further appears that no limitations are imposed as to where the meters may be located, therefore any and all revenue so derived from parking meters installed in City owned parking areas can be allocated to the Police Department in its proportionate share as set forth in Section 5.06 aforementioned.

The power of the Police Department to police parking meters is inherent and the fact that they are off-street meters, within City owned parking lots would not affect this power, as no distinction is made as to the kind or location of City owned meters and violations as to parking would come under their police powers.

We are therefore of the opinion that the Police Department can police and enforce parking regulations of all off-street parking meters and would be entitled to receive up to 30 per cent of all revenues derived therefrom.

IMPOUNDED VEHICLE REVOLVING FUND

(No. 11987—Alderman 5th Ward—A. F. G.—December 13, 1955.)

We have your letters of October 17th and 27th relative to increasing the cost of redeeming motor vehicles, abandoned on the streets and public places of the city by the owners of such vehicles. In your last letter you say:

"The problem connected with the removal of abandoned cars is to provide revenue for the city, so as to make possible the spending of city money for additional pounds and for a speed up of the taking and sale of abandoned vehicles. Because of the city's stringent financial limitations, any expansion of the removal of abandoned cars depends on collecting additional revenue.

In several cities, the ordinances which impose a general fee, a towing fee, and storage fees upon redemption of an abandoned vehicle, also require the owner to pay fines for all violations, as a condition of redemption. Under our procedure, I assume that this end would have to be achieved by the usual procedure of giving a ticket or issuing a warrant."

You call attention to a section of the traffic code of the city of Seattle which reads as follows:

"Section 114. *Impounded Vehicle Revolving Fund Created.* There is hereby created in the City Treasury an 'Impounded Vehicle Revolving Fund', into which all proceeds from the redemption of impounded vehicles shall be paid and from which all claim for towing and storage services shall be paid, as hereinafter provided."

You then ask: "Would it be legally possible to establish such a revolving fund here? The advantage of such a revolving fund would be that it would create an incentive to increase it in order to remove more abandoned cars; and it would also be constant proof of the self supporting nature of the operation."

We find no legal objection to setting up such a revolving fund. For several years a revolving fund has been set up in the annual appropriation ordinance in the department of buildings and known as the "Rat Control

Revolving Fund". The provisions of this fund may be found in the annual appropriation ordinance for 1955 as printed in pamphlet form at page 55.

In both of your letters you asked whether an administrative charge might be levied in addition to the towing and storage charges fixed in the ordinance. We are of the opinion that such a charge could legally be defended and suggest that section 27-177 of the "Traffic Regulations", as amended October 5, 1955 (C. J. October 5, 1955 pp. 1101-1102) be further amended by adding at the end of the said section the following: "In addition to the towing and storage charges provided above a charge of per cent for administrative costs may be levied, based on cost records maintained by the department of police."

REWARD FOR CIVILIAN HEROISM

(No. 12002—Chairman, Committee on Finance—C. N.—January 17, 1956.)

We have your communication of January 11, 1956, to which you attach a resolution describing in detail the heroic action of Leonard Powell, a resident of Chicago, who, on August 18th last, at great personal peril and the risk of irreparable harm befalling his loved ones, successfully enlisted the aid of police in apprehending Richard Carpenter, wanted for the wanton murder of a policeman. The resolution concludes as follows:

"RESOLVED, That the Committee on Finance be and is hereby directed to give consideration to the matter of authorizing the payment of one thousand dollars to Leonard Powell as compensation for a great and courageous service rendered to the City and its residents beyond the call of duty of a citizen."

You ask for our opinion on this matter.

In various prior opinions on this subject matter, including our opinion of March 18, 1932, on Claim No. 7503, for the Commissioner of Public Works (a digest of which can be found at page 723, volume XVIII, Opinions of the Corporation Counsel and Assistants), we enunciated the rule that the City Council can appropriate only for a corporate purpose. Such purpose is defined as one which is germane to the objects for which the corporation was created and which has a legitimate connection with those objects. In other opinions we have narrowed this definition to the statement that the corporate fund can be expended only for necessary municipal purposes.

It is the duty of every resident to cooperate with the police in the apprehension of a criminal. Situations could be conceived of wherein, to expedite the apprehension of a wanted criminal, the City Council could authorize the payment of a reward to those assisting in his capture. These would constitute calculated expenditures which might be deemed necessary. But to reward an act of this nature already performed, where the performer had an interest in the prospective apprehension of a criminal and where no fund has been designated in advance for the specific purpose, would open the flood gates for giving post deed rewards to any citizens who might perform heroic acts in assisting the police.

We are of the opinion, therefore, that this resolution should not be offered or passed in its present form but should be amended in its conclusion so as to express appreciation for the act of heroism performed, without mention of specific monetary reward.

TRANSFER OF FUNDS FROM CONTINGENCIES ACCOUNTS

(No. 12059—City Comptroller—B. M. K.—July 24, 1956.)

In your letter of July 20, 1956 you requested our opinion as to whether or not appropriation transfers may be made either into or out of accounts for "Contingencies" as defined in Chapter 24, Paragraph 22-1 (8) of the Illinois Revised Statutes.

It is our opinion that transfers can be made into and from the Fund for "Contingencies" within the same department. This transfer can be made under the provisions of Section 22-1 which reads as follows:

"At any time during the fiscal year, the corporate authorities by a majority vote of all their members and upon request of the mayor, may make transfers within any department or other separate agency of the municipal government, of sums of money appropriated for one corporate object or purpose to another corporate object or purpose, but the aggregate of transfers from any appropriation shall not exceed five per cent of the appropriation; and at any time after the first half of each fiscal year, the corporate authorities have power, by a two-thirds vote of all of their members, *to make transfers within any department or other separate agency of the municipal government, of sums of money appropriated for one corporate object or purpose to another corporate object or purpose in excess of said 5% limitation*, but no appropriation for any object or purpose shall by virtue of any transfer herein authorized be reduced below an amount sufficient to cover all obligations incurred or to be incurred against that appropriation."

The legislative intent in providing this transfer provision was to alleviate to some extent the rigidity of specification required in the appropriation procedure. It should be remembered that the Statute places a limitation in the amount of \$100,000.00 on any fund for "Contingencies".

INSURANCE FOR VOTING MACHINES

(No. 12062—Board of Election Commissioners—A. F. G.—August 2, 1956.)

We received the following letter from your Board signed by Theodore J. Isaacs, attorney for your body.

"I enclose a copy of a letter submitted by me to the Board of Election Commissioners upon which the Board took the following action.

On July 3, 1956 at a regular meeting of the Board of Election Commissioners, a motion was duly made and seconded and unanimously approved by said Board to refer the subject matter of my letter, as counsel for the Board, to the office of the Corporation Counsel of the City of Chicago with the request that the said Corporation Counsel render an opinion as to the necessity for maintaining insurance on the City's voting machines as more fully set forth in said letter.

It is the belief of the Board that the use of the machines is a municipal function and that the cost of approximately \$12,500.00 per year to insure said machines may be an unnecessary expenditure on the part of the Board of Election Commissioners.

The Board earnestly solicits the opinion of the Corporation Counsel for the City of Chicago with regard to the advisability of maintaining this insurance. It is to be noted that the policy in question expires on August 5, 1956."

The letter which accompanied the foregoing letter, discussed at considerable length certain policies of insurance carried by your Board. You ask that we furnish "an opinion as to the necessity for maintaining insurance on the City's voting machines".

The question of whether or not your Board should carry insurance on its voting machines is a matter of policy which your body should determine. This office does not pass on questions of administrative policy.

The City of Chicago does not carry policies of insurance on its real or personal property. The buildings owned by the City are not insured, nor are the vehicles and equipment of the police, fire, street, public works and other departments insured against loss by fire, collision or other causes. The City is also a self-insurer under the "Workmen's Compensation Act".

In the appropriation ordinance for 1956, for the Board of Election Commissioners an item for "Premiums on Insurance" in amount of \$35,200. has been provided. If in the judgment of your Board policies of insurance should be carried on property of the Board you may legally place such insurance but not in excess of an amount which can be purchased within the limits of the amount appropriated for insurance premiums.

This office has uniformly held that a municipality in conducting elections is engaged in a governmental function for which no liability attaches to the City for injuries or damages sustained by others due to the negligence of its employees or agents. Where, as here, there is no liability on the City it would not appear to be advisable to pay for insurance protection.

SPECIAL ASSESSMENT IMPROVEMENT FUNDS

(No. 12158—City Comptroller—J. E. C.—August 27, 1957.)

In your letter you refer to chapter 24-9-63 of the 1955 Revised Statutes of Illinois, which refer to special assessment moneys held as a special fund, and you request advice as to the suggestion you make pertaining to all of the money received for special assessments and held by the municipal treasurer as a special fund.

The law requiring all money received on any special assessment shall be held by the treasurer as a special fund to be applied to the payment of the improvement for which the assessment was made and the money shall be used for no other purpose except to reimburse the municipality for money expended for such improvement, does not mean that moneys paid on any of the five installments of the particular improvement shall be held in a separate fund.

We are of the opinion that moneys received on each improvement which carries a warrant number shall be held in one account for the five installments for the reason that moneys in excess of that due on one installment may be used to pay bonds issued on the second installment or the following installment. However, special assessment funds received in the payment of one improvement may not be transferred for the payment of bonds in another improvement. Therefore, we see no reason for the treasurer to have separate accounts for each installment of any special assessment improvement.

SURPLUS PARKING FACILITY REVENUE

(No. 12220—City Comptroller—J. P. M.—April 29, 1958.)

You recently advised us that the Parking Facility Revenue Ordinance passed on September 18, 1952 (c. j. pps. 3139 to 3167 inclusive), described how revenue accumulated in the Parking Facility Revenue Fund was to be utilized.

You further call our attention to the amendment to said ordinance passed by the Council on June 6, 1956 (c. j. pps. 2764 to 2768 inclusive), and you request our interpretation concerning said amendment.

Your letter states that on December 31, 1957, a balance of \$757,692.61 remained in the Parking Revenue Fund after paying or setting aside all sums required for operations, maintenance, interest on bonds, bond reserve fund contributions and sinking fund contributions.

In view of the June 6, 1956 amendment, you request us to inform you whether this balance in the Revenue Fund:

- 1) can be transferred directly to the Parking Facilities Construction Fund to be used to further the acquisition and building of facilities under the A-4 and prior programs

or

- 2) whether the funds must be transferred first to the Corporate Purposes Fund and then be disbursed for construction of parking facilities. Since no provision has been made for such expenditures in the 1958 budget for the Corporate Purposes Fund, would it be necessary to hold the funds in the Parking Facility Excess Revenue Fund until the end of the year 1958 and then appropriate for disposition in 1959 all such monies from the Corporate Purposes Fund?

We have made a study of the said Parking Facility Ordinance of September 18, 1952 and the amendments thereto and are of the opinion that the following are the proper answers to the questions you asked:

- 1) that said balance in the Surplus Revenue Fund cannot be transferred directly to the Parking Facility Construction Fund to be used to further the acquisition and building of facilities under A-4 and prior programs:
- 2) and further, that, in accordance with the last paragraph of Section 5.07 of said Ordinance of September 18, 1952,

“The amount accumulated in the Surplus Revenue Account in any fiscal year shall be transferred to the General Corporate Fund annually and may be appropriated by the City Council for any of the following purposes:

1. Not to exceed 20% of the amount accumulated in the Surplus Revenue Account in any fiscal year to the Police Department for traffic regulation.
2. To extend, improve existing parking facilities or complete those under construction.
3. To acquire, lease or construct additional parking facilities and the payment of all expenses incidental thereto.
4. For surveys, reports, plans and specifications for parking facilities.

5. To provide a depreciation fund for existing parking facilities.
6. For purchase by the City of Parking Facility Revenue Bonds at public or private sale (Bonds so purchased shall be cancelled and not reissued).
7. For redemption by the City of Parking Facility Revenue Bonds as provided by ordinance.
8. All costs incidental to refunding of any bonds."

We are of the further opinion that Section 4 of the amendatory ordinance of June 6, 1956 (C. J. p. 2768) is not effective because it is inconsistent with the provisions of Article IX of the ordinance of September 18, 1952 relative to the need for the consent of the bondholders to the amendment or modification of said ordinance of September 18, 1952. To our knowledge the amendatory ordinance of June 6, 1956 did not procure the required consent of the bondholders.

In conclusion, we are therefore of the opinion that the sum of \$757,692.61 remaining in the Parking Revenue Fund (which we assume to be the surplus revenue account thereof) of December 31, 1957, must first be transferred to the general Corporate Fund and at the proper time then appropriated by the City Council for any of the purposes set out in Section 5.07 of the Parking Facility Revenue Ordinance above cited.

TRANSFER OF PARKING FACILITY FUNDS

(No. 12230—City Comptroller—J. P. M.—June 11, 1958.)

We acknowledge your letter in which you request an opinion regarding Section 5.06 of the Chicago Parking Facility Revenue Bond Ordinance of September 18, 1952, as amended.

In your letter you set out the amendment of Section 5.06 contained in the Council Journal of July 23, 1956, and request that we answer the following questions pertaining thereto:

- (1) Whether the July 23, 1956 Amendment of Section 5.06 is valid.
- (2) Whether the City Comptroller may transfer or direct charges against parking meter revenues for the use of the Police Department before operating results for a fiscal year may be reasonably ascertained.

In answer to your first question we refer you to our Opinion of April 28, 1958, in which we held that any amendment to the original Chicago Parking Facility Revenue Bond Ordinance without the consent of the bondholders as required by Article IX of the Ordinance is ineffective. To our knowledge no such consent was obtained for the amendment of July 23, 1956.

In answer to your second question we assume you mean to transfer funds for the use of the Police Department prior to appropriation by the City.

Section 5.06 of the original Chicago Parking Facility Revenue Ordinance provides that "not more than 30% of all said Parking Meter Revenues may be appropriated to the Police Department for enforcement of traffic regulation." (Emphasis ours.)

Furthermore, Section 7.3 of said Parking Facility Revenue Ordinance recites:

*"Parking Facility Maintenance and Operation Budget, * * *"*

“* * * In this connection it is the intent of the parties that the *statutory provisions relating to appropriations* be complied with.” (Emphasis ours.)

Section 22-1 of the Cities & Villages Act, Illinois Revised Statutes, 1957, sets out how the City of Chicago may appropriate monies. It provides for preparation of an Annual Appropriation Ordinance by the Mayor and approved by the City Council.

Inasmuch as Section 5.06 of the Parking Facility Revenue Ordinance specifically states that “not more than 30% of all Parking Meter Revenues may be appropriated * * *,” it is our opinion that an amount not to exceed 30% of Parking Meter Revenue can only be appropriated for the Police Department in the annual appropriation ordinance as provided for in Section 22-1 of the Cities and Villages Act, Illinois Revised Statutes, 1957.

We are therefore of the opinion that the City Comptroller cannot make any transfer against meter revenues for the use of the Police Department unless such funds are appropriated in the current Appropriation Ordinance.

PARKING FACILITY FUND SURPLUS

(No. 12256—City Comptroller—J. P. M.—October 23, 1958.)

You request an opinion as to whether surplus funds under the Parking Facility Fund Ordinance may be used by you to complete payment on the A-4 parking program. You advise that these funds are being held in a trust fund separate and apart from other municipal accounts.

Please be advised that Section 52.1-5 of Chapter 24, Cities & Villages Act, Illinois Revised Statutes 1957, provides in part as follows:

“* * * revenue derived from projects shall be set aside as collected and deposited in a separate fund, separate and apart from all other funds of such municipality * * *.”

This section authorizes the treating of such funds as trust funds.

You next ask whether these funds, remaining after other accounts have been provided for, may be used by you for completion of the A-4 program without being placed in the general corporate fund.

In the case of *Simpson v. City of Highwood*, 372 Ill. 212, at page 219, the Court stated:

“We have never held that contracts for or the expense of constructing the portion of a local improvement which are not to be paid from general funds of a municipality must be preceded by a general appropriation. * * * The bonds in either case, are not obligations of the municipality and the holder can look only to a special fund for payment, which must be segregated and *never becomes part of the general corporate funds.*” (Emphasis ours.)

Therefore, when you have allocated to all the accounts in the Parking Ordinance, it is our opinion that the remaining funds should be used to complete the A-4 program under the ordinance and further, that such funds should not be made part of the corporate fund. Indeed, a surplus revenue account, under the case above cited, is an account in which surplus monies may be placed after the other accounts in the Parking Ordinance have been paid and after the program contemplated by the Ordinance has been completed and paid for. There can be no surplus that could be transferred to the corporate funds until the Parking Facility projects for which bonds have been issued have been completed and put in operation.

This opinion is supplementary to our opinion of April 29, 1958.

PURCHASE AND MAINTENANCE OF PARKING METERS

(No. 12294—City Comptroller—J. C. M.—September 2, 1959.)

In reply to your request for an opinion dated July 1, 1959 as supplemented by your letter of August 27, 1959, we call your attention to the provisions in Article I, Section 1.01 (s) of the basic ordinance providing for the issuance of City of Chicago Parking Facility Revenue Bonds passed on September 18, 1952 (C. J. pp. 3142-67 at page 3144) where it is provided in the definition of "Cost of Maintenance and Operation" means *inter alia* "the cost incurred in making all collections of parking revenue, * * * and additions to revenue collection facilities and similar equipment and supplies used in connection with the actual operation of the parking facilities; * * * together with all other expenses whether similar or dissimilar which, under good accounting practice, are properly chargeable to operation and maintenance of the parking facilities, including all expenses for repairs and upkeep, including both material and labor costs, purchase or rental of equipment and the replacement of old, damaged, worn out or stolen parking meters at established locations, equipment and other physical additions necessitated by wear and tear;"

Answering your queries set forth in your letter of July 1, 1959, it is our opinion:

1. That it is within the provisions of the ordinance referred to above to purchase new parking meters from the Chicago Parking Facility Revenue Bond Fund, as an expense under Cost of Maintenance and Operation. This applies not only to the parking meters owned by the City of Chicago prior to January 1, 1959, but also to those acquired from the Chicago Park District on January 1, 1959.

2. That the entire operation with respect to the revenue expense and replacement of all parking meters should be carried on through the Parking Facility Revenue Bond Fund under the provisions of the ordinance, as set forth above, as being part of the Cost of Maintenance and Operation.

3. That Council action is not necessary to transfer these activities in 1960 from the corporate fund to the Parking Facility Revenue Bond Fund, but they will be reflected generally in the operation budget.

In the opinion rendered on October 15, 1958 to Alvin Weber, Budget Director, we advised him that the parking meters which were obtained by the City on January 1, 1959 became the property of the City of Chicago and did not come under the Revenue Bond Ordinance. However, since it appears to be the desire of the City that the parking meters obtained from the Chicago Park District be replaced and if they are replaced from funds of the Chicago Parking Facility Revenue Bond Fund, then, of course, the meters would be the property of the City, but subject to the trust imposed thereon by the provisions of the original ordinance above referred to and the supplemental ordinances that were passed by the City Council. Therefore, if you proceed under paragraphs (1) and (2) above, the opinion rendered to Mr. Weber, Budget Director, on October 15, 1958, should be disregarded.

C. JUDGMENTS AND CLAIMS

WATER TAX EXEMPTION FOR RELIGIOUS INSTITUTION

(No. 11784—Commissioner of Water and Sewers—M. I. W.—February 8, 1954.)

We have your letter of November 24, in which you request our opinion as to whether the "I AM TEMPLE OF 'I AM' READING ROOM OF CHICAGO", is entitled to an exemption from water charges, under section 185-47 of the Municipal Code of Chicago, which reads as follows:

"The commissioner of public works may exempt from the payment of water rates, property herein enumerated as follows:

(a) Such property as is owned and used in the immediate conduct of carrying out of the purposes of any charitable, religious or educational institution, including the residence occupied by the janitor or caretaker of a religious institution if located on the premises of such religious institution, if application be made for such exemptions to the commissioner of public works in the form prescribed by him and if it shall appear to the satisfaction of said commissioner that such property is not used for gain or profit, or rented or conducted, operated or maintained for the purpose of producing revenue. As a prerequisite for the granting of such exemption, the commissioner of public works shall upon demand be provided with access to the financial records of such institution."

According to the statement on the exemption application and the report of your inspector, which you included in your letter, it is claimed that the use to which the property is devoted is exclusively religious and educational, the activities being conducted on the premises consisting of religious worship and religious education, instruction and training. The organization has no capital stock and is organized as an Illinois not for profit corporation. It is further claimed that all services are rendered without charge and the entire income is derived from voluntary gifts or offerings.

The report further points out that while it is claimed that the entire twelve floors of the building are used for church purposes, and the first eight floors consist of auditoriums, classrooms, a dining room and other uses commonly associated with religious activity, the upper 4½ floors are all single rooms, a total of 55 in all and are occupied by 16 employees, who receive twenty dollars per week with two free meals per day and 39 other persons who are members of the organization or students. These are all gainfully employed in outside industry and make a contribution of various amounts for the room and the two meals a day received. It is stated that these donations vary from \$40.00 to \$100.00 per month and that the only work or help rendered by these members of the church are various voluntary duties performed during the evenings and on holidays, none of which were mandatory.

Mr. Oliver M. King, whose signature appears on the application for exemption, came to our office upon our invitation and gave additional details as to the activities of this latter group and it appears that while whatever activity is performed is not mandatory in the sense that it is contractual, it is expected, and it is a fact that all of these residents perform some sort of duties whether it be leading or attending classes or "washing floors".

We assume that no serious question exists as to whether the organization falls within the category of a "charitable, religious or educational institution".

"As applied to the uses of property, a religious purpose means a use of such property by a religious society or body of persons as a stated place for public worship, Sunday schools and religious instruction." *The People v. Deutsche Gemeinde*, 249 Ill. 132 (1911).

Thus that portion of the building used for public worship and religious instruction, specifically the first eight floors, is entitled to the exemption.

The problem remaining relates to the other parts of the building used for residence purposes with the question being whether these premises are "used in the immediate conduct of carrying out the purposes of any charitable, religious or educational institution", as required by the ordinance.

The Supreme Court of Illinois in construing a water exemption ordinance of the City of Chicago reading substantially the same as the one now before us, held that sleeping quarters and dining halls housing and feeding students at the University of Chicago were used "in the immediate conduct and carrying on of the charitable purposes of the university". And the fact that a charge was made for the room rent and meals did not mean that the buildings were used for the purpose of producing revenue. *City of Chicago v. University of Chicago*, 228 Ill. 605 (1907). The court said:

"For hundreds of years the dormitories and the dining halls have been an essential part of universities and colleges. When the American colonies began founding universities and colleges, the first step was the erection of buildings for lodging and feeding the students while they pursued their studies under the supervision of the college authorities, and the courts have uniformly held that buildings used by colleges exclusively as dormitories and dining halls for its students, or premises occupied by the president or professors and their families are devoted to the purposes for which such institutions are organized."

In the case of *People v. Young Men's Christian Association of Chicago*, 365 Ill. 118 (1936), the court held that the operation of a hotel by the Y. M. C. A. was in furtherance of the charitable purpose of the association and the property was held exempt from taxation by the terms of its charter. The court held that under the circumstances involved furnishing wholesome living conditions to young men at a price they can afford to pay and thereby correcting "the social evils that surround men who would be otherwise compelled to live in cheap rooming houses, amid sordid environments", was a charitable purpose.

Thus we have illustrated above two situations where the furnishing of sleeping accommodations were held to be entitled to exemptions.

There is, however, another line of cases where property used for lodging purposes in connection with religious institutions has been held not to be used for religious purposes and not entitled to exemptions.

Thus in *People v. Muldoon*, 306 Ill. 234, 137 N. E. 863, 28 A. L. R. 857 (1923), a monastery of Catholic nuns who renounced all the affairs of the world and all connection therewith and devoted their lives to prayer and worship was held not exempt from taxation as being a "place used for religious purposes" the primary use being that of a residence.

This decision followed the doctrine laid down in *People v. First Congregational Church*, 232 Ill. 158, 83 N. E. 536 (1907). In which a parsonage was held to be a residence and therefore devoted to a secular rather than a religious purpose.

However, in *People v. Catholic Bishop of Chicago*, 311 Ill. 11 (1924), it was held that property on which was located a seminary preparing young

men for the priesthood was exempt from taxation as property used exclusively for a religious purpose. The property involved in this case included a dormitory and recreational facilities including a lake area for boating and swimming.

In attempting to draw the line as to when property used for residence purposes may be held to be devoted to religious, charitable or educational purposes, the following appears to be the view of the Illinois Supreme Court.

Extremely wide latitude is given where the institution involved carries on an educational purpose whether religious or secular, and provides living accommodations for students, faculty and others connected with the school. This broad exemption is justified as stated in the *University of Chicago* case cited above on a historical basis. In other cases, however, unless it appears that the furnishing of residential facilities is itself the charitable purpose to which the property is dedicated (as seen in the *Young Men's Christian Association* case, *supra*) a more rigorous test is applied with the result that the court has held a convent and parsonages not entitled to exemptions as being devoted to religious use.

It should be borne in mind that each of the exemptions rests on the language found in the exempting statute, ordinance, or charter subject to whatever further limitations constitutional provisions may impose in each case.

The ordinance with which we are concerned provides that the property must be used in the immediate conduct of carrying out the purposes of the religious institution. In addition to the first eight floors such quarters as are used to house full time students or faculty should in our opinion be granted an exemption. However, such quarters as are used to house persons who spend full time in private employment and participate in activities in the building in the evening spare time are not under the cases viewed as being used "in the immediate conduct" of religious or educational activity and should not under the ordinance be exempted.

The fact that the financial contribution of residents is called a donation rather than rent does not seem to us to change the character of the occupancy.

In *City of Chicago v. University of Chicago*, cited above the court cited with favor the following language from *Yale University v. New Haven*, 71 Conn. 316:

"The fact that certain sums are paid for the use of rooms occupied does not alter the character of the operation. The church is none the less a church because the worshippers contribute by the way of pew rent, the hospital is none the less a hospital because the beneficiaries contribute somewhat towards its maintenance * * *"

We believe that as a corollary to the above statement it follows that the mere fact that the sums paid are called donations rather than rents likewise "does not alter the character of the operation" but is merely a matter of internal policy or practice.

As to the employees residing on the premises, the ordinance extends the exemption beyond the property used in the immediate conduct of carrying out the purposes of the religious institution to include "the residence occupied by the janitor or caretaker of the institution". This is a limited extension of the basic exemption. The purpose of this provision would seem to be to cover the residence of the employee whose presence or easy availability is needed at all hours and whose function is related to the overall operation of the physical plant. Quarters of employees who fall in this category may be exempted but such exemption should not automatically extend to cover the quarters of any employees outside the express terms of the ordinance.

In summation, it is our opinion that the exemption from water charges may be granted for the first eight floors which are used for purposes generally associated with church activity, for such quarters as generally house full time students or faculty, and for quarters in which a janitor or caretaker resides, but should not be granted for premises housing other employees or persons engaged in full time outside employment.

AIRPORT LANDING FEES

(No. 11805—*Manager of Airports*—B. M. K.—April 21, 1954.)

By your letter of April 9, 1954, you requested our opinion as to the legal rights of the City of Chicago which would enable it to forbid the use of the airports in Chicago to any itinerant user or any regular passenger service which refuses to pay ordinance fees.

Illinois Revised Statutes 1953, Chapter 24, Section 22-7 (1), applying to municipalities of 500,000 or more, expressly provides:

"Every municipality (of 500,000 or more) has power to operate any public airport and to charge and collect rents, rates and other compensation for any use thereof or for any service rendered by the municipality in the operation thereof, provided that, subject to the capacity thereof, the landing field, landing strips and landing float shall be available to any person, without unjust or unreasonable discrimination as to services and charges, for landing and take-off by any aircraft;" and

"(4) to regulate the use of such airports, the navigation of aircraft over such airports and the approach of aircraft and their take-off from such airports."

Illinois Revised Statutes 1953, Chapter 24, Section 23-96, grants broad powers to municipalities in the operation of its airports.

A municipality or other public authority has power, as regards its airport and the airplanes using it for taking off and landing purposes, to pass reasonable air traffic rules and regulations, which may be changed from time to time as necessity and safety require, and patrons of the airport, to avail themselves of its use, must abide by such rules and regulations. *Spokane v. Williams*, 157 Wash. 120, 288 P. 258.

The City of Chicago can forbid the use of its airports to any aircraft operator who refuses to pay the City's ordinance fees, subject only to the fees themselves being uniform and reasonable.

LIABILITY FOR ACCIDENT AFTER ARREST

(No. 11920—*Commissioner of Police*—S. R. D.—July 1, 1955.)

We acknowledge receipt of your letter of June 10, 1955, to which is attached a report submitted by Captain John Scherping, dated May 10, 1955, requesting an opinion as to whether the City of Chicago and a policeman, or either of them, would be liable for damages to a motorist or others if the officer, after arresting the motorist for a traffic violation, would enter the automobile of the violator and direct him to drive to the nearest district

police station for booking and posting of bond and while so doing the motorist becomes involved in an accident.

Sections 42d, 42h and 43a of the Motor Vehicles Act and Sections 39 and 45 of the Drivers' Licenses Act (Ill. Rev. Stat., 1953, Chap. 95½, pars. 62, 66, 67a, 73.39 and 73.45) declare violations of the Acts to be misdemeanors.

Sections 21 and 22 of the Uniform Act Regulating Traffic On Highways (Ill. Rev. Stat., 1953, Chap. 95½, pars. 118 and 119) provide as follows:

"Section 21. It is unlawful and, unless otherwise declared in this Act with respect to particular offenses, it is a misdemeanor for any person to do any act forbidden or fail to perform any act required in this Act.

Section 22. No person shall wilfully fail or refuse to comply with any lawful order or direction of any police officer invested by law with authority to direct, control, or regulate traffic."

The courts have held that the violation of a municipal ordinance, subjecting the offender to the penalty of a fine, is a misdemeanor (*The People v. Edge* (1950), 406 Ill. 490, 497).

Therefore, if a motorist violates either a state or municipal traffic regulation he has committed a misdemeanor. If done in the presence of a policeman he is subject to arrest without a warrant.

Section 9-93 of the Revised Cities and Villages Act (Ill. Rev. Stat. 1953, Chap. 24, par. 9-93) provides that a policeman shall have the power "to arrest or cause to be arrested, with or without process, all persons who break the peace, or are found violating any municipal ordinance or any criminal law of the State". Section 4 of Division VI of the Criminal Code (Ill. Rev. Stat., 1953, Chap. 38, par. 657) provides as follows:

"An arrest may be made by an officer or by a private person without warrant, for a criminal offense committed or attempted in his presence, and by an officer, when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it."

The courts have sustained these statutory provisions and have consistently held that an officer can make an arrest without a warrant for the violation, in his presence, of a municipal ordinance or a State law. (*Conkling v. Whitmore* (1907), 132 Ill. App. 574, 579; *The People v. Scalisi* (1926), 324 Ill. 131, 147; *The People v. Edge* (1950), 406 Ill. 490, 497).

Assuming, therefore, a legal arrest, we now turn to the question of whether the negligence of the motorist can be charged to the City or its policeman.

It has been held that the regulation of traffic on public streets is the exercise of a governmental function (*Scarpaci v. City of Chicago* (1946), 329 Ill. App. 434). The arrest is a governmental function and, therefore, the City of Chicago is immune from liability. In *Taylor v. City of Berwyn* (1939), 372 Ill. 124, policemen, while in pursuit of a fugitive from justice, collided with a truck which, in turn, struck Taylor who subsequently died. In a suit against the City of Berwyn and the policemen the court denied recovery on the ground that the City was engaged in a governmental function and, therefore, immune from liability, saying (p. 129):

"A city, in the use of the police powers conferred upon it by the legislature, does not act in its private capacity or in the local interest but in the exercise of a governmental function in the general public interest, and it is not liable for the negligent acts of its officers in the enforcement of police regulations enacted for the purpose of securing and preserving the safety, health, welfare and good order of the public.
* * * Manifestly, the operation and maintenance of the police depart-

ment by a municipal corporation is an exercise of a governmental function so as to relieve it, in the absence of statutory provision to the contrary, from liability for personal injuries resulting from the malfeasance or nonfeasance of the departmental officers or employees." (Emphasis ours.)

The immunity from liability of a municipality in the performance of a governmental function, irrespective of the negligence of its agents, is clearly demonstrated by the cases (*Culver v. City of Streator* (1889), 130 Ill. 238; *Craig v. City of Charleston* (1899), 180 Ill. 154; *Sykes v. City of Berwyn* (1943), 320 Ill. App. 440; *Prickett v. City of Hillsboro* (1944), 323 Ill. App. 235).

The governmental immunity of a municipality applies to one injured while in the custody of law enforcing officers. In *Evans v. City of Kankakee* (1907), 231 Ill. 223, the court held that the City was not liable for the unlawful acts or neglect of its policemen in the management of the jail or the detention of a person therein, even though such person be afflicted with small-pox and persons who work or reside near the calaboose contract said disease.

In *Kelly v. City of Chicago* (1944), 324 Ill. App. 382, the court held that an inmate of the House of Correction, maintained by the City of Chicago, had no right of action against the City for injuries received by him in an accident occurring while he was engaged in work connected with the making of bricks which the City sold at a profit, because the maintenance of the House of Correction is the exercise of a governmental function.

We are, therefore, of the opinion that the City of Chicago would not be primarily liable to a motorist or his guests in the automobile for injury to his or their person or property while the motorist, under arrest for a traffic violation, was driving his automobile in the company of a policeman to a police station for booking and posting of bond.

The immunity from liability of a municipality in the performance of a governmental function does not inure to the benefit of its policemen, although in *Taylor v. City of Berwyn* (1939), 372 Ill. 124, the Supreme Court held the policemen immune from liability when they were in hot pursuit of a criminal. Except in that case, the courts have consistently held that a policeman is liable for his negligent acts, even though he may be performing a governmental function. Justices Schaefer and Hershey, in their dissenting opinion in the case of *Gaca v. City of Chicago* (1952), 411 Ill. 146, summarized the foregoing principles as follows (p. 159):

"Municipalities have not heretofore been liable for the unlawful or negligent acts of policemen in the performance of their duties (*City of Chicago v. Williams*, 182 Ill. 135; *Evans v. City of Kankakee*, 231 Ill. 223; *Culver v. City of Streator*, 130 Ill. 238). The policeman, however, has been individually liable for his tort, notwithstanding he commits it while engaged in the performance of a governmental function (*City of Chicago v. Williams*, 182 Ill. 135; *Board of Trustees of Odell v. Schroeder*, 58 Ill. 353; *Wisher v. City of Centralia*, 273 Ill. App. 168)."

Therefore, the next question is whether the negligence of a motorist, who has been legally arrested for a traffic violation, can be charged to a policeman who accompanies the motorist, in the motorist's automobile, to the police station for booking and posting of bond.

Research does not disclose any case where recovery was allowed under similar circumstances.

Reasoning from established legal principles we are forced to conclude that the negligence of a legally arrested motorist cannot be charged to the accompanying policeman. It is a fundamental principle of law that one need not answer for injuries to another unless he is negligent; and that the essential elements of a cause of action for negligence are (1) the existence of a duty on the part of the person charged to protect the complaining party

from the injury received; (2) a failure to perform that duty; and (3) an injury resulting from such failure (*Devaney v. Otis Elevator Co.* (1911), 251 Ill. 28, 33; *McClure v. Hoopston Gas Co.* (1922), 303 Ill. 89, 96; *Merlo v. Public Service Co.* (1942), 381 Ill. 300, 312).

In the situation under consideration it is presumed that the policeman is not driving the automobile. It is also presumed that the motorist, who has been legally arrested for a traffic violation, is in possession, control and driving the automobile at the time of the accident. It is further presumed that the policeman is merely accompanying the arrested motorist to the police station for booking and posting of bond. Under such circumstances it is our opinion that the policeman has no duty to direct the arrested motorist how to drive his automobile; and that the negligence, if any, of the arrested motorist could not be charged to the policeman. There being no duty to the injured persons, which the policeman failed to perform, he could not be guilty of negligence. Therefore, the policeman would not be liable for damages if the arrested motorist was "involved in an accident [with] resultant personal injury to the violator, his passenger, or passengers, and or property damage to the violator's, his passenger's or passengers' property".

However, if it is proven that the presumed accident resulted from the negligent act or acts of the policeman (*i.e.*, if the policeman was driving the automobile of the arrested motorist at the time of the accident; or if the policeman ordered the arrested motorist to drive at an excessive speed or through a stop light) he would be personally liable for the damages resulting therefrom.

If a judgment was entered against the policeman for injuries resulting from his negligence then, and in that event, the City would be required to "indemnify the policeman for any judgment recovered against him as result of such injury, except where the injury result from the wilful misconduct of the policeman" (Ill. Rev. Stat. 1953, Chap. 24, par. 1-15).

Summarizing the foregoing we conclude (1) that under the common law the City of Chicago would not be liable for injuries resulting from an accident when a legally arrested motorist, accompanied by a policeman, is on his way to a police station for booking and posting of bond; (2) that the negligence of the legally arrested motorist, who, while accompanied by a policeman to the nearest police station for booking and posting of bond is involved in an accident, cannot be charged to the policeman; (3) that an individual may recover damages from a policeman if injured as the direct result of the negligence of a policeman; and (4) that under Section 1-15 of the Revised Cities and Villages Act (Ill. Rev. Stat., 1953, Chap. 24, par. 1-15) the City of Chicago must indemnify the policeman for any judgment entered against him for an injury incurred by another while the policeman is engaged in the performance of his duties, except where the injury results from the wilful misconduct of the policeman.

POLICE VEHICLES WITHOUT SIRENS

(No. 11979—Commissioner of Police—H. M. N.—November 15, 1955.)

Your letter of October 26, 1955 enclosing a report by the Chief of the Traffic Division is hereby acknowledged. This report raises two related questions upon which you request an opinion, (1) Are police vehicles still classified as emergency vehicles if they are operated while sirens are disconnected? (2) Would civil damage be collectible from the city if a police vehicle were involved in an accident without a siren?

With regard to the first question, we submit that a police vehicle is an emergency vehicle by definition, in both the Illinois Revised Statutes and the Municipal Code of Chicago.

Chapter 95½, paragraph 99(d) of the Ill. Rev. Stats. 1955, defines emergency vehicles as,

"Police vehicles, vehicles of the fire department and ambulances and emergency vehicles of municipal departments or public service corporations as are designated or authorized by proper local authorities."

Section 27-1 of the Municipal Code of Chicago defines an authorized emergency vehicle as,

"Any vehicle of the Chicago fire insurance patrol, the fire department or police department of any governmental agency, or any ambulance, or any repair or service vehicle of a governmental agency or public service corporation, authorized by the commissioner of police."

It would appear from the definitions above that a police vehicle is an emergency vehicle and the use or nonuse of a siren would not alter that fact.

With regard to the second question, it should be noted that paragraph 150 of Chapter 95½ permits an emergency vehicle to exceed the *prima facie* speed limitations when responding to an emergency call, *where the driver sounds an audible signal by bell, siren or exhaust whistle*. This permission is granted an emergency vehicle only when responding to an emergency call, and then only when sounding an audible signal.

Permission is granted an emergency vehicle to exceed the *prima facie* speed limit and go through stop signs and lights, when responding to emergency calls *and* when pursuing law violators, by section 27-20 of the Municipal Code of Chicago, when using an audible signal, as may be reasonably necessary. It would appear that under this section of the Code, sounding an audible signal "as may be reasonably necessary" means such audible signal must be given when approaching and going through stop signs or stop lights and other intersections and when driving upon a straightway, above the *prima facie* speed limits, where there is other traffic.

It would, therefore, appear that a police emergency vehicle, responding to an emergency call, and exceeding the *prima facie* speed limits would be in violation of paragraph 150 of Chapter 95½ and that a police emergency vehicle chasing a violator and exceeding the *prima facie* speed limits would be in violation of Section 27-20 of the Municipal Code of Chicago when going through a stop sign or stop light or other intersection and when traveling upon a straightway upon which there was other traffic when not sounding an audible warning signal.

However, in order to have liability in an accident there must be negligence and the violation of a statute or ordinance is not in itself negligence. However, taken in conjunction with other facts surrounding a given situation, it might be one fact of many from which negligence could be imputed.

We must, therefore, state that the operation of an emergency vehicle, without the use of an audible warning signal, could in a given situation provide a basis for liability on the part of the police officer and possibly a duty on the city to indemnify him under paragraph 1-15 of the Cities and Villages Act (Chapter 24, Ill. Rev. Stats. 1955).

PROJECTING AIR CONDITIONING UNIT

(No. 11992—Alderman, 27th Ward—A. F. G.—December 29, 1955.)

In your letter of December 8, 1955 you refer to a proposed order re: the maintenance of air-conditioning units which project beyond the lot lines and over public ways and which constitute a potential danger to sidewalk traffic. You ask whether the City would be liable for damages incurred as a result of the falling of any of these prospective air-conditioning units.

It is the duty of the City to keep its streets free of obstructions and reasonably safe for persons using the same, and is bound to use reasonable care to keep its streets in a reasonably safe condition and is liable for any injury to persons or property resulting from its failure to exercise such reasonable care.

If the City has notice, actual or constructive, that air conditioning units have been placed in such manner as to project over a street, and injury results from the falling of such unit, the City would be held liable in damages.

Legislation should be enacted giving to city officials power to regulate the maintenance and location of these units. If permitted to project over the public ways the owner should be required to furnish a bond to indemnify the City in case damage results.

CHARGES* FOR CITY ARCHITECT'S SERVICES

(No. 11997—Librarian, Chicago Public Library—J. R. B.—January 4, 1956.)

In your letter of recent date, you request our opinion as to the legality of certain charges made by the City Architect covering work his department did for you in designing a branch library building.

Please be advised that it is our opinion that all such charges are proper and legal. The City of Chicago owes no duty to furnish any such service to the Chicago Public Library because it is a separate taxing body and makes its own appropriations and tax levy.

The City Architect has informed us that he has been able to furnish you similar services in the past without charge and as a courtesy by his staff when such services would not deplete his appropriations or interfere with his duties to the City.

COLLECTION OF DELINQUENT AIRCRAFT PARKING FEE

(No. 12080—Commissioner of Public Works—J. E. S.—October 15, 1956.)

Your letter of recent date requests that this office inform you as to what procedure should be followed to collect delinquent aircraft parking fees from a Mr. James Coulas.

In addition to a procedure previously recommended by letter dated April 21, 1954 in response to a similar request of this office, it would be our

suggestion that the procedure next outlined would be applicable in the instant case.

- (a) Request by letter addressed to the Administrative and Records Branch, W-240, Civil Aeronautics Administration, Washington 25, D. C., the name and address of the present owner of subject aircraft, if informed that said James Coulas is the owner then:
- (b) Concurrently with submission of complete factual data, request that the Law Department initiate action pursuant to the provisions of "An act for the better protection of any person, firm or corporation expending labor, skill or materials upon, in furnishing storage for, any chattel, creating a lien upon such chattel, and providing for the enforcement of such lien" (Approved June 27, 1921, Section 40-47, Chapter 82, Ill. Rev. Stat. 1955);
- (c) Request that a certified copy of Notice of Lien be forwarded immediately after its filing to the office heretofore mentioned in subparagraph "a" hereof pursuant to Part 503. Regulations of the Administrator, Civil Aeronautics Administration.

It is not intended to convey the thought that the foregoing procedure is the only procedure available in the instant case but it is, in our opinion, as previously stated, most apropos.

SPECIAL POLICE — LIABILITY OF CITY

(No. 12107—Commissioner of Police—J. A. C.—February 20, 1957.)

Regarding your recent inquiry Re: Section 11-22 of the Municipal Code of Chicago, entitled Special Police for Humane Societies.

We presume you are referring to the liability of the City of Chicago when you refer "to determine the responsibility of the City under this ordinance." Said liability of the City of Chicago is set out in Chapter 24-1-15 of the Smith & Hurd Annotated Statutes:

"1 - 15. Indemnification for injuries caused by policeman; Liability for injuries incurred while assisting a policeman.) Section 1-15. In case any injury to the person or property of another is caused by a member of the police department of a municipality having a population of 500,000 or over, while the member is engaged in the performance of his duties as policeman, and without the contributory negligence of the injured person or the owner of the injured property, or the agent or servant of the injured person or owner, the municipality in whose behalf the member of the municipal police department is performing his duties as policeman shall indemnify the policeman for any judgment recovered against him as the result of such injury, except where the injury results from the wilful misconduct of the policeman.

For the purposes of this section no civilian defense worker, nor any member of any agency engaged in any civilian defense activity, performing services as a part of any civilian defense program, shall be considered to be a member of a municipal police department.

If any person in obeying the command of any such policeman to assist in arresting or securing an offender is killed or injured or his property or that of his employer is damaged and such death, injury or damage arises out of and in the course of aiding such policeman in arresting or endeavoring to arrest a person or retaking or endeavoring to re-take a person who has escaped from legal custody, the person or

employer so injured or whose property is so damaged or the personal representatives of the person so killed shall have a cause of action to recover the amount of such damage or injury against the municipal corporation by which such policeman is employed at the time such command is obeyed. As amended by act approved July 20, 1945. L. 1945, p. 477."

The legislature specifically stated the exemptions when they enumerated civilian defense workers or any member of any agency engaged in civilian defense activity, performing services as a part of any civilian defense program. This did not include special police as being exempted.

Section 11-22 of the Municipal Code of Chicago states in paragraph number 2:

"The special policemen so appointed shall be particularly charged with the duty of enforcing the provisions of this code relating to cruelty to children and other persons and cruelty to animals. They shall comply with and be subject to all the rules and regulations prescribed by the commissioner of police for the government, control, and duties of such special policemen. They shall also perform such other special and temporary police duties as may, in emergency cases, be required by the commissioner of police or other police officer, or as may be required by the rules and regulations so prescribed. They shall, in the performance of such duties, have all the powers and privileges of patrolmen of the police force of the city."

The City Council gave the special police for humane societies the duty of enforcing the provisions of the code relating to cruelty to children and other persons and cruelty to animals all the powers and privileges of patrolmen of the police force of the City of Chicago.

In the matter of the *City of Chicago v. Burke*, 226 Ill. 191 at page 203, the court stated:

"Where there is an existing legal office, one who assumes to fill the office and acquires the reputation of being the officer he assumes to be will be an officer *de facto*—citing *Barlow v. Stanford*, 82 Ill. 298."

In *Erickson v. Fitzgerald*, 342 Ill. App. 223 at page 227 the court stated:

"In 1945 Section 24—1-15 was amended and the present act substituted. It broadens the base of liability to 'any injury' caused by policemen in performance of duties where there is no contributory negligence. The liability of the municipality however is changed from direct liability to that of indemnitor except in cases of wilful and wanton conduct when judgments are recovered against policemen. Thus it seems that until 1945 the Legislature followed the trend away from immunity of public corporation while maintaining a purpose to protect policemen and firemen against personal liability."

In *Neallus v. Hutchinson Amusement Co.*, 126 N.E. 469, 55 A.L.R. 1191 the court held that a special policeman appointed to a duty at a theatre at the proprietor's request, whose services are paid for by the proprietor have been held to be public officers whose duty it is to preserve the public peace.

In *Moss v. Campbell's Creek R. Co.*, 75 W. Va., 62, 83 S. E. 721, the Court stated that a private person or corporation is not liable for the acts of a special police officer appointed by public authority, but employed and paid by the private person or corporation, when the acts complained of are performed in making an arrest in his capacity as a public officer.

In determining the necessity of such an ordinance we should take into consideration the fact that horses and animals were much more prevalent at the time of its passage and that because of the change in circumstances namely the liability of the City of Chicago and also the scarcity of horses and animals in the City, we feel this section should be repealed.

WORKING OUT FINES

(No. 12138—*Superintendent, House of Correction—J. C. M.—July 16, 1957.*)

In your letter of July 9, 1957 you refer to House Bill 741 signed by Governor Stratton, changing the amount to be allowed a prisoner in working out his fine and you ask whether or not the Act is retroactive so as to apply to prisoners presently under sentence.

Under the Bill, a prisoner would be allowed \$5.00 for each day's work to apply upon this fine, where under the previous law it was \$1.50 per day. This Act applies only to prisoners convicted of petty larceny or any misdemeanors punishable under the laws of this State.

Under Section 24-7 of the Municipal Code of Chicago is the following provision:

"Every person committed to the House of Correction by a judgment of the Municipal Court for violation of any city ordinance shall be allowed, for each day's work, exclusive of his bond, the sum of \$2.00, which shall be applied in payment and satisfaction of the fine and costs imposed upon such person."

House Bill 741 was signed by the Governor after July 1, 1957 and became effective upon the date of his signature. The effect of the Act is to reduce the penalty of a violation of law by allowing a credit of \$5.00 per day instead of \$1.50 per day where the fine has to be worked out. The Act does not apply to prisoners who are in your custody under sentence. The Act is not retroactive. After a person has been sentenced under the law as it then existed, that sentence cannot be changed by any subsequent law (Citing *People v. Lisle*, 390 Ill. 327, 328). A statute will be presumed to operate prospectively, only, and will not be construed to have retroactive operation unless the language employed is so clear that it will admit of no other construction (Citing *People ex rel. Kerner v. McKinley*, 371 Ill. 190; *People ex rel. Carlstrom v. David*, 336 Ill.).

In order to be consistent with the policy established by the State, it would be in order for you to recommend to the City Council that Section 24-7 of the Municipal Code of Chicago be amended to allow the application of \$5.00 instead of \$2.00 for each day's work in the payment and satisfaction of a fine and costs.

INJURED TREE TRIMMER

(No. 12208—*Commissioner of Public Works—C. P. H.—February 27, 1958.*)

We have your letter of January 23, 1958, requesting our opinion as to whether or not the City is liable for personal injuries sustained by an applicant for the position of Tree Trimmer while taking a practical test to determine his ability to climb trees.

A Municipal Corporation in Illinois, acting in the exercise of its corporate, ministerial, or proprietary capacity, is subject to liability for its torts (*Gravander v. City of Chicago*, 399 Ill. 381). Municipalities are immune from

liability for torts committed by them while in the performance of governmental functions (*Gebhardt v. Village of LaGrange*, 354 Ill. 254; Illinois Law and Practice, Volume 9, Page 18, Section 15).

The City, in performing its duty to maintain trees in a safe condition in its public ways, acts in its corporate, or proprietary capacity (*Ruele v. City of Chicago*, 268 Ill. App. 266). The giving of an examination for the position of Tree Trimmer, is a necessary step in the discharge of this duty. Therefore, it is our opinion that the City may be liable for injuries to a person taking a practical test for the position of Tree Trimmer, if the proximate cause of the injuries was the negligence of the City in conducting the test. The question of the City's liability, however, must be determined from the facts and circumstances in each case.

You request us to prepare a form to be signed by the applicant providing for the waiver of his right of action against the City for personal injuries, if any, sustained by him in taking a test for the position of Tree Trimmer. It has been repeatedly held by the Courts that such exculpatory agreements are void on the ground that it is against public policy to permit a person to relieve himself of liability occasioned by his own negligence, or failure to perform duties imposed upon him by law (*Campbell v. C.R.I. & P. Ry. Co.*, 243 Ill. 620; *Carney Pickas & Co v. C. R. Jahn Co.*, 347 Ill. App. 379).

It is, therefore, our opinion that an applicant for the position of Tree Trimmer should not be required to sign a waiver exempting the City from liability for its negligence in conducting a practical examination of the applicant to test his ability to climb trees.

UNION STATION DRIVEWAY FEES

(No. 12209—Commissioner, Streets and Sanitation—E. B. & W. H. S.
—March 3, 1958.)

In your letter dated December 12, 1957 addressed to this office requesting an opinion on the above subject matter, you state that Mr. A. B. Olson, Auditor and Secretary of the Chicago Union Station Company, has requested the City to cancel three City warrants for annual fees of \$6.60 each for maintenance of driveways for the year 1957. You quote Mr. Olson's explanation as follows:

"The driveways mentioned in these warrants were constructed as part of the work done by Chicago Union Station Company under the ordinance of March 23, 1914, granting it the right to construct, maintain and operate its station and facilities. The driveways were included in the changes in streets and grades shown upon plans filed with and approved by the Commissioner of Public Works, as required by that ordinance. Since the driveways were constructed and are being maintained pursuant to the contract ordinance of 1914, they are not subject to the annual permit fees required of certain other driveways by section 33-18 of the Municipal Code. Under the circumstances therefore, I respectfully request that you cancel these warrants."

In reply, we beg to advise that if the driveways in question were a part of the plans submitted under said ordinance of March 23, 1914 and were approved as provided in said ordinance by the Commissioner of Public Works of the City of Chicago and they were constructed in conformity therewith, the position taken by the officials of Union Station Company is tenable for the reason that section 33-18 of the Municipal Code does not apply to those driveways which come under the provisions of the ordinance of March 23, 1914 providing for the construction of Chicago Union Station. You will also

note that under section 11 of said ordinance of March 23, 1914 the Union Station Company expressly holds the City harmless from "any and all damage and expense (including damages to private property) under which it may be subjected by reason of the Union Station Company's using and occupying any of the streets and alleys within the limits hereinbefore described and the changes of the grades of any of the streets and alleys including the approaches to the viaducts", etc.

We have been advised by your department that no permit for such driveway has ever been issued to the Union Station Company by your department and no application for such permit has ever been made. We are also advised by both your department and Mr. Olson of the Union Station Company that no annual fee for maintenance of such driveways has ever been paid by the Union Station Company to the City of Chicago.

In view of the foregoing and based upon the facts recited, the position taken by the Union Station Company is valid and said warrants cannot be collected from them.

We trust that this satisfactorily answers your inquiry.

SUFFICIENCY OF STATUTORY NOTICE

(No. 12240—City Clerk—C. P. H.—July 18, 1958.)

We have your letter of July 8, 1958 wherein you state that on July 7, 1958, at approximately 9:00 P. M., a man representing himself as an attorney, entered your office and attempted to serve a notice in compliance with par. 1-11, ch. 24, Ill. Rev. Stats., 1957, which provides as follows:

"Within six months from the date that such an injury was received or such a cause of action accrued, any person who is about to commence any civil action in any court against any municipality for damages on account of any injury to his person shall file in the office of the city attorney, if there is a city attorney, and also in the office of the municipal clerk, either by himself, his agent, or attorney, a statement in writing, signed by himself, his agent, or attorney, giving the name of the person to whom the cause of action has accrued, the name and residence of the person injured, the date and about the hour of the accident, the place or location where the accident occurred, and the name and address of the attending physician, if any."

You further state that no employee of the City Clerk's office was present at that time. However, Mr. William Johnson of the City Collector's office and a police officer were present. Mr. Johnson refused to accept the notice, stating that he was not an employee of the City Clerk, but the attorney insisted upon leaving it and it is still in the possession of the City Collector.

You further represent that on the morning of July 8, 1958, a copy of the notice was found on the counter in your office. The notice purports to be signed by Yale Stein, attorney for Mollie Mozner, 6439 N. Claremont Avenue, and alleges an injury January 7, 1958.

You request advice whether you should enter this notice in your records and whether you should enter a date of receipt of such notice.

Section 25-S of the Municipal Code of Chicago provides that on week days the office of the City Clerk shall be closed to the public at four o'clock P. M. July 7, 1958, the date an attempt was made to file the notice, was a Monday. Thus the notice was left, under the circumstances described in your letter, long after your office was closed to the public.

It has been repeatedly held by the courts that notice must be filed strictly in accordance with the statute. In the case of *Scholer v. City of Rockford*, 160 Ill. App. 217, the court held that to constitute the filing of a notice, the paper must be placed in the hands and under the control of the clerk and must pass into his exclusive custody and remain within his power. In the case of *McCarthy v. City of Chicago*, 312 Ill. App. 268, it was held that presentation to the City Council of a claim for personal injury by an alderman on behalf of a claimant, which bore upon it the endorsement of the City Clerk, was not in compliance with the statute requiring the filing of notice with the City Clerk. Manifestly in the instant case the notice was not filed with the City Clerk in accordance with law.

In answer to your inquiry, it is our opinion that you should not enter this notice in your records, nor should you enter any date of receipt of this notice. However, we suggest that a file be retained in your office containing all papers and documents relative to this matter.

DEMOLITION OF A PARTY WALL

(No. 12245—Chief Engineer—L. A. W.—August 7, 1958.)

Your request to the Honorable John C. Melaniphy, Corporation Counsel, for an opinion regarding Parking Site No. 68 was referred to me for reply.

We have had several meetings between the owner of the adjoining property, his attorney, a representative of the wrecking company, a representative of your office and Mr. Walter V. Lesak of our office for the purpose of discussing this matter, but we were unable to obtain the adjoining owner's consent to remove the wall in question.

Although we were unable to determine which of the properties was constructed first, an examination of the pictures in our file indicate that both properties have been in existence for over twenty years.

It appears from your letter that the roofing on the adjoining building is flashed to the roof of the building to be wrecked. Under the City contract with A. J. Ross & Company, when the City's building is completely removed, the rear one-story adjoining building will lose a closing wall and its roof will be torn where the flashing is removed.

We find in 47 Corpus Juris, 1331, that: "Where a wall between adjoining buildings has, during at least the prescribed period, usually twenty years, been continuously and uninterruptedly used as a party wall by respective owners, such wall becomes a 'party wall' within the legal meaning of the term, or at least a right or easement arises, to use it as such even though the wall stands wholly on the land of one of the adjoining owners."

In *Maypole v. Forsyth*, 44 Ill. App. 494, it was held, that: "When the right to take down a party wall, because it has become unsafe, exists, the party who takes it down without the consent of the other, must exercise reasonable care to do his neighbor no unnecessary harm; but the support which the building of the neighbor needs in place of the wall, the neighbor must himself provide. The whole duty of the party taking down the wall is negative—to do no unnecessary harm; not affirmative—to prevent consequence of the exercise of his right. When the right to support by the wall ceases, the owner of the building needing support, must provide it".

It was held in *Bean v. Dow*, 152 Atlantic 609 (N. H. 1930), that: "The defendant had a right to remove his wall for the purpose of building a new and better one. In doing this he was bound to refrain from inflicting damage upon the plaintiff by conducting operations in a negligent way".

We are, therefore, of the opinion that even though the wall to be removed is situated entirely on the City property, if the adjoining owner had the continuous use of this wall for twenty years or more, we must exercise reasonable care in the removal of this wall so as not to damage the adjoining property.

We are enclosing a copy of a notice to be sent to the adjoining owner giving him notice of our intention to remove the wall in question so that he will have ample opportunity to protect his property.

LIABILITY — LIBRARY EMPLOYEE'S NEGLIGENCE

(No. 12259—Manager, Chicago Public Library—C. P. H.—November 26, 1958.)

We have your letter of November 6, 1958, requesting our opinion as to the tort liability of the City of Chicago for damages arising out of the negligence of an employee of the Chicago Public Library while driving his own automobile during the course of his employment. You state:

"If an employee, while on the job, is instructed to travel between two branch Libraries, or between a branch and main, and does so by driving his own car, and negligently injures a third party while doing so, will the City, through the Library, be liable for such negligence under each of the following circumstances:

- a. The employee is requested to drive rather than take public transportation, in order to save time, carry materials, etc., although he or she will be repaid in carfare.
- b. The employee is given carfare, or is offered Library transportation, but elects to drive and is permitted to do so, solely for his own convenience.
- c. The employee is told not to drive, but does so without the Library's knowledge."

I.

ANSWER TO SUB-PARAGRAPHS "A" AND "B" ABOVE.

It is a well established rule of common law that a Municipality is liable for the negligence of its officers, or its employees in the exercise of corporate, proprietary, or ministerial functions, as distinguished from the exercise of governmental functions, and the doctrine of *respondet superior* applies (9 I. L. P. Sec. 472, and cases cited therein; Opinion of Corporation Counsel addressed to you under date of June 13, 1958). The Appellate Court of Illinois in *Johnson v. City of Chicago*, 174 Ill. App. 414, aff'd. 258 Ill. 494, held that the City of Chicago maintains the Chicago Public Library as a ministerial activity and is liable for the torts of an employee of the Library resulting from his negligent operation of an automobile owned by the Library while conveying books from one Library Building to another. The Court stated at Page 417:

"While the question is not free from difficulty, the cases in this State tend to support the doctrine that where the City, in pursuance of the authority conferred by law, erects a public Library, it is required to exercise reasonable care in the maintenance and management of the Library; that such duty is not discretionary but ministerial, and that the City is liable for the negligent performance of such duty."

It is clear that under the law the City is liable for damages from the negligent operation of a Library owned automobile by a Library employee during the course of his employment.

Each question presented for consideration in sub-paragraphs "a" and "b" above, deals with the City's liability growing out of the negligence of a Library employee in operating his own automobile while on Library business, with the consent of his superiors.

It is a general rule of law that it makes no difference upon the question of employer's ultimate liability that the vehicle may belong to the servant himself, provided only that the servant was driving it at the time with actual or implied consent of his employer and in the discharge of the duties owed by the servant to him. Whether the servant was using the automobile with the express or implied authority of his employer depends upon the facts in each case (Cyclopedia of Automobile Law and Practice by Blashfield, Vol. 5, Sec. 3078).

This rule was adopted by the Appellate Court of Illinois in the case of *Hogan v. City of Chicago*, 319 Ill. App. 531. In that case an action was brought against the City for injuries sustained by plaintiff as a result of an automobile collision occasioned by the negligent driving of an employee of the City while such employee, who was employed as a laborer on a City garbage truck, was driving his own car to his loading station after reporting for work. The Court held the City liable under the doctrine of *respondet superior* because the evidence showed that at the time of the negligent act complained of the employee was acting within the scope of his employment and that the use of his automobile in his employment had been either expressly or impliedly authorized by his superior. The Court stated at Page 545:

"We fail to see what difference it makes in so far as the employer's liability for the negligent act of his employee is concerned, whether the servant was driving his employer's car with his express authority, or whether he was driving his own car with the implied authority of his employer, so long as in either case such driving was done in connection with his master's business and within the course of his employment or incidental thereto. It is difficult to perceive how defendant's liability for its servant's negligence would be affected by the fact that the car was owned by the servant and that he was paying the expenses of its operation.

In our opinion the controlling element in this case is whether Jones, acting within the course of his employment, was authorized to use his own automobile to get to his loading station and that presented a question of fact for the jury. The evidence discloses beyond a doubt not only that Jones was driving his car when the accident occurred with the acquiescence, knowledge, consent and permission of defendant, but that the City, through O'Malley, its Ward Superintendent, actually encouraged him to do so. This being so, the only permissible conclusion for the jury to have reached under the circumstances in evidence was that Jones had implied authority to drive his automobile to his loading station and that since he had implied authority to so drive his car, his driving of same was within the course of his employment."

In each of the circumstances related in subparagraphs "a" and "b" above, the employee would have permission from his superior to use his own automobile during the course of his employment. Under the authorities cited herein, an employer is liable for the negligent acts of his employees while the employee is so using his automobile.

It is therefore our opinion that the City of Chicago would be liable for the torts of a Library employee resulting from his use of his own automobile under each of the circumstances set out in subparagraphs "a" and "b" of your letter.

II.

ANSWER TO SUB-PARAGRAPH "C" ABOVE.

In Subparagraph "c" above, you ask whether the City is liable for damages resulting from the negligence of a Library employee in operating his own automobile on Library business without the knowledge of his superior, and in disobedience of instructions not to so use his automobile.

The general rule of law is that an employer is not liable for the negligence of his employee in the operation of an automobile in the business of the employer in disobedience of instructions not to so use such automobile. Whether the automobile is owned by the employee, or the employer is immaterial in determining the liability of the employer for the negligence of his employee (52 A. L. R. 2d 300; *Hogan v. City of Chicago*, 319 Ill. App. 531). In the case of *Nelson v. Stutz Chicago Factory Branch, Inc.*, 341 Ill. 387, an employee took an automobile owned by his employer from a service station and used it for demonstration purposes in violation of the employer's rules. The employee, while driving the automobile, struck another vehicle causing the death of a passenger. The Court in holding the employer not liable for the negligence of the employee stated at Page 394:

"The rule is well established that the owner of an automobile is not liable for damages caused by its negligent operation by an employee whose possession of the vehicle is without the owner's permission. The relation of master and servant must exist to make the owner liable and the servant must be acting at the time within the scope of his employment."

The Court further stated at Page 397:

"From the undisputed evidence, Smith was not only without authority to take the automobile, but was absolutely prohibited to do so without obtaining special permission. The master has the right to conduct his business in his own way according to his own rules. His employees have no right to undertake to conduct his business for him in disregard of his rules even though they believe it is to his interest for them to do so. Smith was at no time within the scope of his employment from the time he took the car. He was a wrongdoer throughout his possession of the car."

In the circumstances set forth in subparagraph "c" above, the employee would be instructed not to drive his automobile during the course of his employment and he would do so without his employer's knowledge. We have shown here that under the law an employer is not liable for the negligence of an employee in driving his own car while engaged in the business of his employer, in disobedience of a rule of his employer.

It is therefore our opinion that the City of Chicago would not be liable for the torts of a Library employee resulting from his use of his own automobile under the circumstances set forth in subparagraph "c" of your letter.

SETTLEMENT OF CHICAGO TUNNEL COMPANY CLAIM

(No. 12301—Finance Committee—J. C. M.—October 16, 1959.)

On July 19, 1932, Council Journal Page 2731, the City of Chicago passed an ordinance granting permission to the Chicago Tunnel Company to construct, maintain and operate a tunnel system and to use and occupy existing tunnels of the City of Chicago, together with extensions thereof, for a term of thirty years and thereafter until terminated by at least six months'

written notice by the City to the Company, which grant was subject to the approval of the Illinois Commerce Commission and which approval was obtained.

In said ordinance, there was a provision that in the event of the construction of a subway or subways routed wholly or partly in North and South State Street and North and South Dearborn Street which shall in any manner encroach upon the tunnels and the Company shall, on that account, alter, lower, relocate or reconstruct any of the tunnels or parts thereof or construct connecting tunnels as a substitute for the tunnels removed, intercepted or destroyed, the City shall reimburse the Company for the actual costs, but in no event in excess of \$325,000.00 for the construction in State Street and \$375,000.00 for the construction in Dearborn Street.

It was further provided that in the event of the construction of the subway route, which would interfere with the operation of the tunnel, the City was required to set apart a sum of money equal to the estimated costs of all work to be done on said tunnels but not in excess of the maximum amount of liability of the City. In connection with the construction of the State Street and Dearborn Street Subways, the City removed or destroyed portions of the tunnel located in and under State Street at Illinois Street, at Hubbard Street, at Washington Street, Randolph Street, Adams Street, Harrison Street, Twelfth Street at Wabash Avenue and other crossings under extensions of the Dearborn Street Subway and Franklin Street, Wells Street, Canal Street and Milwaukee Avenue, Jefferson Street and Milwaukee Avenue. The construction of said subways resulted in the destruction and necessitated the abandonment by the tunnel company of all those portions of the tunnel system existing and extending under the surface of the streets referred to. As a result of said damage, the Chicago Tunnel Company filed a suit against the City in the Superior Court of Cook County, No. 43 S 5118, claiming damages in the sum of \$750,000.00, which suit is still pending. In said suit, plaintiff claims that it made repeated applications to rebuild portions of the tunnels and demands on the City to set apart a sum of money equal to the necessary cost of all the work so that the tunnels could be relocated and reconstructed and that the City refused to issue permits and refused to set apart said money.

From an examination of the data available, it appears to be the understanding of the parties that under the terms of the franchise, the City had the option of either depositing the \$325,000.00 and the \$375,000.00 for use by the Chicago Tunnel Company in construction and reconstruction of these tunnels or the City could elect to do the work itself. The City decided to do the work by its agents under supervision by the subway engineers, but the City did not reconstruct all of the parts of the tunnel that were destroyed.

After many efforts by the tunnel company to put the tunnel to its maximum use, without success, reorganization proceedings were filed in the Federal District Court. Under these proceedings, efforts were made to save the tunnel for useful utility purposes and in order to serve business houses along the route in an economical fashion. However, on account of the fact that there were taxes due the Government in the amount of \$74,816.57 for unpaid withholding taxes, a reorganization in the Federal District Court was found to be impossible and, therefore, liquidation and equity proceedings were filed against the Chicago Tunnel Company and a trustee in bankruptcy appointed.

The City of Chicago has claims against the receivership estate in the sum of \$30,789.63, part of which is for a period operated by the Chicago Tunnel Company and part while being operated by the reorganization trustee in the Federal District Court.

The only assets that the Receiver in equity has consists of freight cars and electric locomotives and the cause of action pending against the City of Chicago. The Receiver in equity has petitioned the Federal Court for a leave to sell such assets and it is estimated that the maximum amount that

will be received is \$80,000.00 for the personal property other than the cause of action. We are informed that in addition to the federal taxes due and unpaid that the administration costs in the reorganization proceeding and in the equity proceeding, which are prior liens, will be an amount that would bring the total preferred charged to \$150,000.00.

It is evident that the City will not receive any dividend in the claim of the equity court.

One of the assets in the equity court is the sale and assignment of the cause of action pending against the City of Chicago. It is my opinion that all these claims and counterclaims should be disposed of before the equity proceedings are ended. The sale of this cause of action could be prejudicial to the City of Chicago, resulting in a substantial judgment in damages.

The City has agreed with the equity receiver that possession of the tunnel will be delivered to the City of Chicago on December 31, 1959.

In many conferences covering the subject matter and the analysis of the assets in the receivership estate and the potential value of the cause of action, I have reached a tentative agreement with the receiver which is subject to your approval and the approval of the Federal Court. It is my sound judgment that it would be to the benefit of the City of Chicago to release the claims filed in the Federal Court for rent and have a judgment entered against the City in the sum of \$10,000.00 in full settlement of the case pending in the Superior Court. In connection with that settlement, the pumps used for pumping water out of the tunnel and motors that are in the possession of the receiver and operated in connection with the tunnel will be turned over to the City. The rails are to remain as part of the tunnel. It would cost a considerable amount of money for the City to purchase such machinery and rails in the open market. In this regard, I feel that there is considerable salvage against the settlement proposed. In addition thereto, the receiver will assign to the City of Chicago all of its interest in leases (17) presently in force and effect in the operation or use of the tunnel, the rental of which in 1958 totaled \$25,294.20. Commencing January 1, 1960, this rental will be payable to the City of Chicago.

This subject matter has been pending since 1932 and it is to the interest of the City that these controversies be disposed of.

I therefore recommend that an order, transmitted herewith, be authorized by the City Council.

CITY EMPLOYEE'S TORT LIABILITY

(No. 12308—*Superintendent, House of Correction—C. P. H.—December 16, 1959.*)

We have your letter of December 8, 1959, requesting our opinion as to the tort liability of a City employee for damages arising out of his negligence in the operation of a City owned motor vehicle (a) while engaged on City business; and (b) while driving the said motor vehicle to and from the House of Correction and the home of the City employee.

Under the common law of the State of Illinois, a person is not absolved of personal liability to a third person on account of his negligence or other wrongful act merely because at the time he was acting as an employee within the scope of his employment. An employer and employee are jointly and severally liable for injuries resulting to a third person from the negligence or other wrongful act of the employee while acting within the scope and

course of his employment, although the liability of the employer is based on the doctrine of *respondet superior* (17 I. L. P. Secs. 256 and 257, and cases cited therein).

The Supreme Court of Illinois, in the case of *Lasko v. Meier*, 394 Ill. 71, in dealing with this subject, stated at page 77:

"A master and servant are each liable for injuries caused solely by the negligent act of the servant in the course of his employment. The servant is liable because he is the active tort-feasor and committed the act which caused the injury. Being the real actor, he is nonetheless liable because acting for another. The master is liable because of the doctrine of *respondet superior*, the rule of law which holds the master responsible for the negligent acts of his servant while acting within the scope of his employment. They may be sued jointly for the injury."

Other cases to the same effect are: *Barran v. Adanick*, 251 Ill. App. 481; *Miller v. National Automobile Sales Co.*, 177 Ill. App. 367; *Johnson v. Magnuson*, 68 Ill. App. 448.

Under the authorities cited herein, it is immaterial whether the employee referred to in your communication, would be using the City motor vehicle on City business, or driving the vehicle to and from the House of Correction and his home to determine his liability. In either case he would be liable for his own negligence. Furthermore, the fact that the City of Chicago, as employer, may be held liable under the doctrine of *respondet superior* for the negligence of the employee under each set of facts set forth in your letter, would not relieve him of liability. Whether or not the City, or the employee carries public liability insurance, would not in any way affect the liability of the employee.

It is therefore our opinion that a City employee assigned to the House of Correction, would be personally liable for injuries to persons and damages to property caused by his negligence in the operation of a City owned motor vehicle (a) while engaged on City business; and (b) while driving the said motor vehicle to and from the House of Correction and the home of the City employee.

COST OF NUISANCE ABATEMENT AS A LIEN

(No. 12351—Alderman 40th Ward—A. F. G.—August 9, 1960.)

Your letter of July 20, 1960, is as follows:

"Is there some procedure that the Department of Streets can follow in cleaning up vacant property and then arranging to have the cost thereof made a lien against the property? If so, I would appreciate being informed of the procedure and the statutes or ordinances which permit this."

In an opinion of this office dated December 17, 1907 in answer to an inquiry as to the right of the city to abate a nuisance and assess the cost of abatement upon the property upon which property the nuisance is maintained or produced, we said:

"In the exercise of the police power possessed by the State it may, by statute, provide that the cost of abating a nuisance shall be assessed against or made a lien upon the property upon which such nuisance is maintained or produced. Such statutes have been passed and have been held constitutional in California, Massachusetts and Nebraska, and perhaps, in other States (Citing cases.)

But, I believe, from a careful examination of the authorities, that such assessments can be made and such liens exist only by virtue of special statutes authorizing them. There is no such statute in Illinois, and I am therefore of the opinion that the City of Chicago has no right to assess the cost of abating a nuisance as a lien against the property upon which it is maintained or produced" (Vol. 4, Opinions of the Corporation Counsel, p. 221).

By Section 23-60 of the Revised Cities and Villages Act, municipalities are granted power "to define, prevent and abate nuisances," but that section does not give the municipality a lien for money expended in such abatement.

By Section 23-70.2 of the said Act, the City is entitled to a lien for monies expended in the demolition, repair or enclosure of dangerous and unsafe buildings.

Again by Section 23-109 of the said Act, the City is expressly granted a lien for expenditures it makes in the extermination of rats in buildings and premises.

In the case of *Village of Palmyra v. Warren*, Ill. App. Vol. 114 p. 562, the village expended money to fill a mill pond on private property which constituted a nuisance and which the owner failed to fill after notice to do so. The village applied for a lien against the property for its expenses. In denying the claim of the village, after citing the statutory powers of the village, the court said:

"It will be observed that no power is therein conferred upon municipalities by either ordinance, resolution or regulation, to impose upon any person or property, real or personal, the cost of abating a nuisance existing thereon or arising therefrom. It follows that there was no legal obligation upon appellees to pay the expense of abating the nuisance in question, and therefore no promise to pay the same could be implied. For this, and the further reason that the property sought to be charged therewith was real estate, we are of opinion that no lien at law existed or could exist upon the property described in the bill."

In our opinion the only remedy we can suggest is to petition the General Assembly at its next session to amend Section 23-60 of the Revised Cities and Villages Act, by granting to municipalities a lien for expenditures made in the abatement of nuisances covered by that section.

D. BONDS

ABBREVIATED SIGNATURE

(No. 11878—City Clerk—J. C. M.—January 12, 1955.)

We acknowledge receipt of your letter of January 12, 1955 requesting an opinion as to whether or not you may sign the Calumet Skyway Toll Bridge Revenue Bonds by using the initials "L. D." instead of your full name. You further state in your letter that your full name, "Ludwig D. Schreiber," was used in the election of April 1951 and that you subscribed the oath of office as such.

Chapter 24, paragraph 23-6 of the Illinois Revised Statutes (1953) provides, among the powers of the corporate authorities, as follows:

"To borrow money on the credit of the corporation for corporate purposes, and issue bonds therefor, in such amounts and form, and on such conditions as it shall prescribe."

The ordinance passed by the City Council on December 9, 1954, authorizing the issuance of \$88,000,000 in Calumet Skyway Toll Bridge Revenue Bonds provides, as to signatures, as follows:

"The Bonds shall be signed by the Mayor of said City and shall be sealed with the corporate seal thereof and attested by the City Clerk and countersigned by the City Comptroller." (C. J. pp. 8736-8737.)

The City Council having prescribed the requirements of execution of said bonds, said requirements must be fulfilled and it is our opinion that you are not authorized to use the initials "L.D." or any other abbreviation instead of your full name.

CONVERSION OF PARKING METERS

(No. 12129—*Commissioner of Streets and Sanitation—W. M. Z.—June 27, 1957.*)

Please refer to your communication of June 12, 1957 with reference to the conversion of 800 parking meters owned by the City and held in reserve by the Duncan Parking Meter Corporation, said meters to be converted for use in other areas at a lower cost than the purchase of new meters.

You requested our opinion as to whether or not you could use the bond construction funds for the purpose of converting the said parking meters. It is our opinion that the bond construction funds may be used for the purpose of converting the said parking meters. We wish to call your attention to Section 7.04 of an ordinance authorizing the issuance of City of Chicago Parking Facility Revenue Bonds approved by the City Council on September 18, 1952, which reads as follows:

"So long as any of the Bonds issued hereunder shall be outstanding, the City shall at all times install and maintain parking meters in accordance with the recommendations of the Commissioner of Streets and Electricity and the Independent Engineer as approved by the City Council. All parking meters shall be maintained in good order and condition and the City will take every step permitted or required by law to effect collection of parking meter revenues. All such parking meters shall be of standard current design and shall be replaced from time to time with new and improved equipment as the Commissioner may recommend or the City, in its deems desirable."

We have in our file a letter from Delauw, Cather & Company, Engineers, dated June 20, 1957, which reads as follows:

"Dear Mr. Zipperman:

At the request of Mr. Robert Rice, Acting Superintendent of Parking for the City of Chicago, we are writing you in connection with the conversion to nickel-dime meters of a stock of approximately 800 penny-nickel meters now owned by the City of Chicago but not in operation.

If this matter has been properly cleared by your office, we, as Independent Engineers for the City of Chicago Parking Program, recommend that the conversion be made."

We take it for granted that your recommendation would be the same as that of the Engineers.

EXPRESSWAY BONDS

(No. 12197—Commissioner, Streets and Sanitation—A. F. G.—January 31, 1958.)

In your inter-office communication you say:

"The General Assembly of the State of Illinois approved House Bills 933C and 934S on July 7, 1955. These House Bills made it possible for the County of Cook to authorize 245 million dollar bond issue for expressways. Since the recent Federal Road Act provides for 90% of Federal money on expressways that qualify under the intra-state system, there will be monies in the above mentioned bond issue which may be used for other than the superhighway system in the Chicago area. We should like very much if the County of Cook could use some of these funds for special traffic improvements within the city of Chicago, such as thru lane overpasses, construction of a new Franklin Street from Harrison Street south, etc.

We have discussed this matter orally with Mr. Henry Cutler and he expressed the opinion that such improvements could be paid from the bond issue. We would appreciate your opinion and for your convenience are attaching a brochure on the bond issue prepared by Blyth & Company, Inc. and call attention to House Bill 933C which is reprinted on Page 14. Also can these funds be spent on other than State Aid Routes?"

Section 56-I of the Act declares it to be the purpose of the Act to help relieve traffic congestion in Cook County by providing the County with power to issue millions of dollars in Expressway bonds to be used to enable cities in the county which do not have financial means to do so, to provide special systems of limited access, Expressways, special bridges, viaducts and other traffic facilities designed to promote and protect the health, safety and welfare of the public in the rapid and safe movement of mass passenger and freight traffic by means of such diversified traffic facilities.

Section 56-K of the Act provides that the resolution or resolutions authorizing the Expressway bonds shall provide for the levy of a direct annual tax upon all the taxable property within the county to pay the principal thereof and the interest thereon as it matures.

Section 56-P of the Act broadly defines the term "Expressway" as follows:

"As used in this amendatory Act, the term 'Expressways' means streets, avenues, roads and drives constituting limited access roadways, with all auxiliary streets, avenues, roads, drives, bridges, viaducts, underpasses, and approaches for ingress and egress to and from the main thoroughfares of such streets, avenues, roads and drives, and other necessary or appropriate appurtenances thereto, to facilitate the movement of through traffic, to be constructed in accordance with the resolutions of the Board of Commissioners heretofore or hereafter approved by the Department of Public Works and Buildings of the State of Illinois and in accordance with the provisions of Section 15d of 'An Act to revise the law in relation to roads and bridges' approved June 27, 1913, as amended."

Section 9 of the Resolution authorizing the issuance of Expressway bonds, defines "Expressways" in the exact language of Section 56-P of the enabling Act as quoted above.

It is our opinion, therefore, that the bonds so authorized may be used for the purposes suggested in your letter, all of which seems to be embraced in the definition of "Expressways" in Section 56-P, of the Act. As this section does not limit the use of the bonds to State aid routes, we do not believe they are so limited.

ELECTRICAL SYSTEM OWNERSHIP

(No. 12330—Port Director—J. C. M.—April 21, 1960.)

In your letter of March 30, 1960 you request an opinion as to the rights of the City in the electrical system at the Navy Pier. Your letter is as follows:

"On March 24th this office received a letter from the Chicago International Fair and Exposition asking if certain electrical wiring at the Navy Pier Exhibit Halls, which wiring includes steel messenger cables running across the length of said halls, plus the multi-conductor drops supported by such cables, would be available to it under its lease of the Pier from June 6 through July 10, 1960. Said letter is attached hereto and made a part hereof, marked Exhibit A.

"The Chicago International Fair and Exposition is sponsored by the Chicago Association of Commerce and Industry and a lease has been entered into by and between the City of Chicago and the Association for the Navy Pier Exhibit Halls.

"For the purposes of preparation and operation of such a trade show the services of a number of contractors are used by management, including carpenters, decorators, electricians, etc. The Chicago International Fair and Exposition wants to be assured that the electrical wiring heretofore described will be available to its contractor.

"The records of the City of Chicago do not disclose who installed the steel messenger cables. They are, however, permanently attached to the structure and as evidence of such permanency, your attention is called to the turn-buckle bolted to the girder at the terminal of the messenger cable, as illustrated in the photograph marked Exhibit B.

"The multi-conductor drops are connected to a junction box by a threaded fitting and the junction box is attached to the building by pipes. See photograph marked Exhibit C. Within the past three years, the City of Chicago installed a new source of electrical power to which are connected the junction boxes heretofore described.

"The electrical wiring in question, to the best of the writer's knowledge, was installed many, many years ago and no part thereof has ever been removed during my tenure in office during the last five and a half years as Port Director.

"This office, therefore, requests an opinion from the Corporation Counsel's Office as to whether the steel messenger cables that run across the length of the exhibition halls and the multi-conductor drops supported by such cables, together with any and all electrical wiring now existing at the Navy Pier Exhibit Halls will be available without additional cost to the Chicago International Fair and Exposition under the terms of its lease with the City of Chicago."

From the foregoing facts and examination of the photographs attached to your letter, it appears that the electrical wiring is part of the

electrical system installed at the Navy Pier. The junction box is attached to the building by pipes and the multiple-conductor drops are connected to the junction box. The cable wiring is part of the system. The entire system is part of the realty.

We have been advised orally that the Fisher Electric Co. claims some right of ownership in the electrical wiring. It claims that it installed some loose wiring as part of the electrical system over twenty years ago and that it has been using it in connection with periodical contracts for furnishing exhibitors at the Pier with electrical accommodations. We find no merit in such a claim. This is a late date for it to make such a claim, especially in view of the fact that the City of Chicago, within the last three years, permanently installed a new source of electrical power to which are connected the junction boxes and electrical accessories.

It is our opinion that the City of Chicago owns this electrical system and that it is a part of the real estate.

STATUS OF FIXTURES ON ACQUIRED PROPERTY

(No. 12333—Commissioner, Community Conservation Board—W. I. K.
—April 27, 1960.)

This is in answer to your letter of April 21, 1960, wherein you request a legal opinion in connection with acquisition of parcels of real property by eminent domain proceedings.

You state that as a result of your relocation responsibilities, a period is necessarily involved during which the city must manage the properties before steps may be taken for their demolition. That during this period you must necessarily have control of the stoves and refrigerators on said premises.

You inquire whether such stoves and refrigerators are regarded as fixtures under the law so that they may then be treated as real estate or whether they are regarded as personal property.

A search of legal authorities indicates that the rule is not hard and fast and depends on certain facts and conditions.

A permanent "fixture" is defined as property fixed to the realty so that it becomes a part or parcel of the realty, giving the owner of the realty the same rights to it as the soil itself.

The three requisites of "fixture" are actual annexation to realty or something appurtenant thereto, appropriation to use or purpose of realty with which it is connected, and intention of party making annexation to make article a permanent annexation to the freehold.

The leading case in Illinois is *Sword v. Low*, 122 Ill. 487 therein the court states (p. 497):

"There seems to be great unanimity in the authorities, that things personal in their nature may retain their character of personalty by the express agreement of the parties, although attached to the realty in such manner as that, without such agreement, they would lose that character, provided they are so attached that they may be removed without material injury to the article itself, or to the freehold. It is not held that parties may, by contract make personal property real or personal at will, but that where an article personal in its nature is so attached to the realty that it can be removed without

material injury to it or to the realty, the intention with which it is attached will govern; and if there is an express agreement that it shall remain personal property, or if, from the circumstances attending, it is evident or may be presumed that such was the intention of the parties, it will be held to have retained its personal character." In Jones on chattel mortgages (5th Ed.) Sec. 133a, it is said:

"One already holding a mortgage of the realty has no equitable claim to chattels subsequently annexed to it. He has parted with nothing on the faith of such chattels. Therefore, the title of a conditional vendor of such chattels, or of a mortgagee of them before or at the time they were attached to the realty, is just as good against the mortgagee of the realty as it is against the mortgagor. The preponderance of authority is to the effect that, where the removal of the fixture will not materially injure the premises, a seller retaining title thereto may assert his right as against a prior mortgagee of the realty."

The court said in *Thurma v. Granada Hotel Corporation*, 269 Ill. App. 484 at page 499 "The trend of modern decisions is in favor of a more liberal construction in holding fixtures personalty (citing *Sword v. Low*, 122 Ill. 503; *Baker v. McClung*, 198 Ill. 28, 34, 35)."

The authorities agree that the injury caused by removal must be material and substantial to prevent the article from retaining its character as personalty.

It must be noted that by custom, usage and practice in this community in the purchase and sale of improved property, title to the real estate is conveyed by deed and title to the stoves and refrigerators in the properties involved is passed by bill of sale. That loans on apartment buildings are secured by notes and trust deeds covering the real estate and by chattel mortgages covering the stoves and refrigerators in said properties.

The relationship of the parties and the facts and circumstances surrounding the transaction involved appear to govern in the question presented here.

In the instant matter, title to real estate is acquired through an eminent domain proceeding. The exercise of the right of "Eminent Domain" is in effect a compulsory sale of owner's interest in realty sought to be appropriated. The entry of a Judgment Order by a court and the deposit of money pursuant thereto passes title in the *realty* to the petitioner in the "eminent domain" proceedings. Personal property in the premises involved remains the property of the respondent. It is difficult, if not impossible in this relationship of the parties to this proceeding to develop or prove an intention on the part of the parties to treat personal property in the premises, like stoves and refrigerators as part of the realty unless unusual facts exist where such intention has been evidenced prior to the proceeding or where by the character of the stove or refrigerator it is so attached to the realty as to become part of it, in those instances where the stove or refrigerator is built into the walls and thus becomes part and parcel of the building.

The legal conclusion is inescapable on the basis of the character and types of real property involved in the Hyde Park-Kenwood Project that the stoves and refrigerators must be regarded as personal property and treated as such with exception as hereinbefore stated.

CHAPTER XI—CITY PROPERTY

A. REAL ESTATE

LEASE CITY PROPERTY TO PORT AUTHORITY

(No. 11809—Commissioner of Public Works—J. G. O.—May 7, 1954.)

In your memorandum of March 4, 1954 you refer to attached copy of letter of the same date sent to you by Mr. Maxim M. Cohen, General Manager and Secretary of the Chicago Regional Port District, and you request our opinion regarding the legal implications of the proposals as set out in Mr. Cohen's letter.

There are two primary legal questions involved with respect to the proposals of the Chicago Regional Port District:

1. Can the City of Chicago grant a 99-year leasehold to the land owned by the City, which is located in the southerly portion of Lake Calumet?
2. Would the City of Chicago be permitted, by law, to participate in the net earnings of the Port Board and if the City could participate in the said earnings, what disposition could the City make of any such funds coming to it?

Any authority that the City of Chicago has with regard to the legal questions set out above is derived from the Lake Calumet Harbor Act, Sections 5 and 6 (Canal and Waterways Improvements, Chapter 19, pars. 117 and 118, Illinois Revised Statutes 1953). Under this Act, the City may lease the land in question for any term of years for industrial, manufacturing or harbor purposes; and such lease, however, shall be approved in writing by the Director of the Department of Public Works and Buildings of the State of Illinois.

All monies received by the City of Chicago from the leasing of said land shall be credited to a fund which shall be called the Lake Calumet Harbor Fund, and may be expended for construction and maintenance of the aforesaid harbor only.

On the East side of the lake between E. 116th Street and E. 118th Street, in Section 24, Township 37 North, Range 14 East, there are a number of small lots totalling a frontage of about 200 feet, with the owners of which the City was never able to enter into any boundary line agreements and who claim adversely to Harry E. McGartney as owners of the patent chain of title. In order to acquire the submerged lands and riparian rights and establish a boundary line in conformity with the other boundary lines established as above, the City brought its condemnation suit, *City of Chicago v. Margaret Copeland, et al.*, No. 55409 in the County Court, which suit is still pending. In order to dispose of this suit, it will be necessary to have a trial to determine the just compensation to be paid to the owner or owners, for the taking of the property involved.

In view of the fact that the four lots involved in the condemnation suit have frontage on Lake Calumet, this property will have to be acquired to complete the City's title claim to the property surrounding Lake Calumet.

This opinion refers specifically to the lands acquired by the City of Chicago under authority of the Lake Calumet Harbor Act of 1913, and amendments thereto.

TITLE OPINION — MIDWAY AIRPORT

(No. 12075—Civil Aeronautics Administration—J. E. S.—September 14, 1956.)

In connection with the above project application, we submit the following opinion as to the right and interest of the City to use and occupy as a municipal airport a portion of the property described as Section 16, Township 38 North, Range 13, East of the Third Principal Meridian in Cook County, Illinois.

The right and interest of the City of Chicago to use and occupy said premises is based on a lease and an amendment thereof from the Board of Education to the City of Chicago, a municipal corporation, for a period of fifty years commencing January 1, 1931 to all the portion of Section 16 in said lease and amendment described, a copy of said lease and amendment being attached hereto and made a part hereof.

Title to Section 16, Township 38 North, Range 13 and East of the 3rd P.M. was acquired by the City of Chicago in trust for the use of schools with the right in the Board of Education of the City of Chicago to manage, control and lease the same by virtue of the following:

Conveyance by the State of Virginia to the United States in 1784 of Section 16 in every township throughout the Northwest territory for school purposes.

Act of Congress May 20, 1787 in which Lot 16 in every township was reserved for the maintenance of public schools within said township.

Enabling act of Congress passed April 18, 1818 entitled "An Act to enable the people of Illinois Territory to 'form a Constitution and State Government, and for the admission of such State into the Union on an equal footing with the original states'" which provided that Section numbered 16 in every township, and when such section had been sold or otherwise disposed of, other lands equivalent thereto and as contiguous as may be shall be granted to the State for the use of the inhabitants of such township for the use of schools.

Ordinance of the Constitutional Convention of the State of Illinois in the year 1818 accepting the provisions of the above mentioned Act of Congress.

Statutes of the State of Illinois relating to titles of school lands and the managing, operation and control of same by trustees of schools or Boards of Education.

By virtue of the documents above shown and the various acts of Congress and the State of Illinois, title to Section 16, Township 38 North, Range 13 was vested in the State of Illinois, not as a trustee, but as a purchaser for a valuable consideration. *Bradley v. Case*, 3 Scammon 585.

The control and management of all school land property thus acquired thereupon became a subject of legislative control and it became the right of

the legislature of the State of Illinois to provide for the control, management, alienation of title and disposition of such property and to provide such agencies for said purposes as the legislature may see fit. *Bush v. Shipman*, 4 Scammon 186.

By virtue of the General School Laws of the State of Illinois, and more particularly by an act entitled "An Act to Establish and Maintain a System of Free Schools" approved April 1, 1872, in force and effect July 1, 1872, title, management and control of School Section 16, Township 38 North, Range 13, East of the 3rd P. M. was vested in the school trustees of that township and with the exception of that part of Section 1, conveyed by said trustees to the Chicago & Western Indiana Railroad, remained in said trustees until the 24th day of April 1915.

In the year 1911 in conformity with the Statutes of the State of Illinois, the Village of Clearing, including in its area all of Section 16, Township 38 North, Range 13, was incorporated.

At the time of the incorporation of said Village there was in force and effect the statute entitled "An Act to Provide for the Annexation of Cities, Incorporated Towns and Villages or Parts of the same to cities, incorporated towns and villages", approved April 25, 1889 as amended (Chapter 24, Section 386 *et seq.* 1939, Article VII, Chapter 24, Ill. Revised Stats., 1955).

In conformity with said Statute, the Village of Clearing was duly annexed to the City of Chicago on April 24, 1915. Under the provisions of the Statute above noted, title to Section 16, Township 38 North, Range 13, was vested in the City of Chicago for use of schools for the same purposes and uses, and subject to the same conditions as before annexation.

Upon the annexation of the Village of Clearing, the Board of Education of the City of Chicago assumed management and control of said Section 16. By indenture dated January 2, 1931, under the provisions of the General School Laws of the State of Illinois (Section 34-20, Chap. 122, Ill. Rev. Stats. 1955), the Board of Education of the City of Chicago leased to the City of Chicago for use as a municipal airport for a period of 50 years terminating on the 31st day of December 1980, pursuant to ordinance of the City Council passed December 30, 1930 based on a resolution of the Board of Education, the following described property:

School Fund Land comprising 588.689 acres, more or less, and described as follows: Section Sixteen (16), Township Thirty-eight (38) North, Range Thirteen (13), East of the Third Principal Meridian, except the West half of the South West quarter of the South West quarter of said Section, also except those parts thereof taken, used or dedicated for streets or highways; also except those parts thereof conveyed to, used or occupied by Chicago and Western Indiana Railroad Company (a corporation of Illinois) for a right of way, in Cook County, Illinois.

This area included all of said section except a portion thereof previously conveyed to the Chicago and Western Indiana Railroad by the School Trustees of Section 16, Township 38 North, Range 13, for a railroad right-of-way, and the West half of the Southwest Quarter of the Southwest Quarter of said section on which a school building, playground and other school facilities had been and are being maintained.

By ordinance of June 30, 1938 (C. J. Page 6247) copy of which is attached hereto as amendment to the lease dated December 30, 1930, provision was made for the inclusion in said lease, of the area granted to the Chicago & Western Indiana Railroad upon conveyance by the Railroad to the City in trust for the use of schools.

Subsequently, on the 7th day of April 1941, the Chicago & Western Indiana Railroad conveyed to the City of Chicago in trust for the use of schools by quit-claim deed recorded as Document 12670782 on April 30, 1941

with the Recorder of Deeds of Cook County, all of that portion of Section 16, previously conveyed to it by the School Trustees of Section 16, Township 38 North, Range 13. The title to the whole of Section 16 thus vested in the City of Chicago for the use of schools.

By ordinance of September 28, 1938 (C. J. Proceedings pp. 6922 to 6929), to permit the construction of an armory the City Council provided for the sale of a portion of the airport property to the Illinois Armory Board free and clear of the lease to the City of Chicago for airport purposes. The land conveyed was described as:

That part of the Southwest Quarter of Section Sixteen (16), Township Thirty-eight (38) North, Range Thirteen (13), East of the Third Principal Meridian, described as follows: Commencing at a point in the South line of said Southwest Quarter, which is Two Hundred Forty (240) feet East of the Southeast corner of the West half of the Southwest Quarter of the Southwest Quarter of said Section Sixteen (16), and running thence North parallel to the East line of said West Half, a distance of Thirty-three (33) feet to a point in the North line of West 63rd Street, said point being the place of beginning of the following described parcel of land, to-wit: Thence North parallel to the East line of said West Half, a distance of Two Hundred (200) feet to a point, thence East parallel to the South line of said Southwest Quarter of Section Sixteen (16), a distance of Seven Hundred Twenty (720) feet to a point; thence South parallel to said East line of said West Half, a distance of Two Hundred (200) feet to a point in the North line of West 63rd Street, said point being Thirty-three (33) feet North of the said South line of Southwest Quarter of Section Sixteen (16); thence West on said North line of West 63rd Street, and parallel to South line of said Southwest Quarter of Section Sixteen (16) aforesaid, a distance of Seven Hundred Twenty (720) feet to the place of beginning, in Cook County, Illinois.

A mortgage of Section 16 in question and other school lands executed for benefit of the Reconstruction Finance Corporation has been released by Release Deed dated August 1, 1944 and recorded October 13, 1944 as Document No. 13375861 with the Recorder of Deeds of Cook County. This Deed from the First National Bank of Chicago released Section 16 and other property of the Board of Education from mortgage recorded February 7, 1939 as Document No. 12269066 with the Recorder of Deeds of Cook County.

We are therefore of the opinion that the City of Chicago in Trust for the Use of Schools is the owner of School Section 16, Township 38 North, Range 13, East of the Third Principal Meridian, except that portion last above described which was conveyed to the Illinois Armory Board, and that the City of Chicago has a valid and subsisting lease to said Section 16, except the West one-half ($W\frac{1}{2}$) of the Southwest Quarter ($SW\frac{1}{4}$) or the Southwest Quarter ($SW\frac{1}{4}$), and the area conveyed to the Illinois Armory Board as above noted.

The City of Chicago is at the present time negotiating with the Board of Education of the City of Chicago to further amend the lease to include within the limits of the Airport the West half ($W\frac{1}{2}$) of the Southwest Quarter ($SW\frac{1}{4}$) of the Southwest Quarter ($SW\frac{1}{4}$) of said Section 16.

The City of Chicago has entered into various leases with airline operators, fixed base operators and others for the use of portions of municipal airport for airport purposes. These leases are noted in the list which will be transmitted to you by the Director of Airports.

LEASING OF PARKING FACILITY

(No. 12134—*Commissioner of Streets and Sanitation—H. S.—July 5, 1957.*)

In pursuance of our acknowledgment on May 9, 1957 of your inquiry as to whether part of Parking Facility No. 33 may be leased to Lakeview Trust and Savings Bank, we consulted the Statute and Ordinance creating the parking facility and find as follows:

Authority was granted to the City of Chicago to acquire properties for the construction of parking facilities by Section 52, 1-1, Ch. 24, Cities and Villages Act, Illinois Revised Statutes, July, 1951, as the City authorities may from time to time find a necessity therefor.

The City Council of Chicago on September 18, 1952 (C. J. pp. 3139-3167), passed the Parking Facilities Ordinance which provides for the issuance of revenue bonds to finance construction of parking facilities and contains among many others the following pertinent provisions:

"WHEREAS, there exists in the residential and outlying and central business districts of the City of Chicago serious traffic congestion and to properly regulate and control traffic within the City, the public benefit, safety and welfare of the City requires that additional parking facilities be acquired, maintained and operated by the City to relieve said traffic congestion and promote the welfare of the citizens and inhabitants of said City."

Article I, Section 1.01, defines Parking Facility as follows:

"'Parking Facility' means the off-street garage or garages, off-street parking areas and parking meters described herein as Initial Project designated as Project A-1, and all other parking facilities acquired or constructed, improved or extended with funds obtained through the issue of the City of Chicago Parking Facility Revenue Bonds, or income derived from the use of all such facilities, including property of any and every kind or description, whether real, personal or mixed as is used in connection therewith but excluding traffic lights or signals, police or traffic equipment used solely to regulate the flow and movement of automotive traffic as distinguished from the parking thereon."

We are of the opinion that the use by any person or corporation of any of the parking facilities for any other purpose than that of parking automobiles in order to relieve traffic congestion is contrary to the intent and purpose of the aforementioned statute and ordinance even though compensation is offered for such use. We deem the operation of a bank depository as herein contemplated to be entirely beyond the purview of a parking facility.

Section 7.06 provides as follows:

"The City shall have the right to sell or otherwise dispose of any property, real or personal no longer necessary, appropriate or required for the use of, profitable to, or for the best interest of the City operation of its parking facilities as provided by law."

The above provision follows the provision of Section 59-1, Ch. 24, Illinois Revised Statutes, pertaining to the sale of real estate by a municipality.

Your attention is called to the fact that the City may dispose of any portion of its property by sale or lease whenever such property is no longer

necessary, appropriate, nor required for the best interest of the City, or is unprofitable.

Such is not the case in the instant matter and therefore no portion of Parking Facility No. 33 may be leased or permits issued for the use thereof other than for the authorized parking facility purposes.

It is therefore our opinion that any lease or permit for the use of any portion thereof, would be illegal and inimical to the interest of the City and in violation of the contract made by the City with the bondholders who financed the parking facility.

STATUS OF TUNNEL OWNERSHIP

(No. 12183—Commissioner of City Planning—R. L. C.—November 22, 1957.)

We have your memorandum of October 28, 1957 wherein you inquire as to the "status of the city's ownership" of the network of tunnels under the downtown area.

In an opinion rendered by this Department on July 18, 1932, which appears in Volume XVIII of the Opinions of the Corporation Counsel and Assistants at page 633, it was said, that

"Under the terms of the ordinance which expired February 19, 1929, the tunnels became the absolute property of the city of Chicago free from all liens and encumbrances. The present ordinance is drafted in the form of a lease treating the tunnels as the property of the city of Chicago and, beyond cavil, the Chicago Tunnel Company or any of its successors, assigns or lessees cannot lay any claim to any property right in the tunnels except as a tenant of the city of Chicago."

In a later opinion, dated April 1, 1940 and reported in Volume XXI of the Opinions at page 208, it has been stated:

"Section 1 of the ordinance of July 15, 1903, as amended, provides that at the expiration of the grant of February 20, 1899 (thirty years from the passage of the ordinance of February 20, 1899) all tunnels and conduits constructed under said ordinance shall, without payment of any consideration (other than in case of purchase under the provisions of this ordinance), become and be the absolute property of the City of Chicago free from liens and encumbrances. That ordinance expired in 1929.

On July 19, 1932 the City Council passed an ordinance granting permission to Chicago Tunnel Company to construct, maintain and operate a tunnel system and to use and occupy existing tunnels of the City of Chicago, etc. The existing tunnels were those constructed pursuant to the ordinances of 1899 and 1903 above referred to. By virtue of the ordinance of July 19, 1932 the existing tunnels were leased by the City of Chicago to Chicago Tunnel Company for a term of *thirty years* from and after the passage of the ordinance of July 19, 1932 and thereafter until terminated by at least six months' written notice by the City to the Company or by like notice from the Company to the City."

The lessee-lessor status between the Chicago Tunnel Company and the City of Chicago under the thirty year lease of July 19, 1932 continues today "for the conveyance, transportation, transmission, receipt and delivery of all kinds of bulk freight, and parcel freight. merchandise and mailable matter,

and include the business of a common carrier through the tunnels (but not for the conveyance or transportation of passengers) ;". (Section 1E Council J. 2732.)

The Chicago Tunnel Company and two kindred companies are presently engaged in a court action for reorganization under the Bankruptcy Act. The City of Chicago has a growing claim against the Tunnel Company for rental of the tunnels under the lease. Currently the claim amounts to \$42,349.58 and represents non payment of rent from July 1, 1953 to September 30, 1957.

Under the Chandler Act (governing railroad reorganization) a date is set by the judge for the filing of claims. Thus far a date has not been set in the Tunnel Company's case. The Act (U. S. Code Title 11 Section 205(j)) also provides that the suits of debtors be stayed pending the outcome of the reorganization and a final court decree in the matter. From the latter, it is obvious that the City is powerless to take action voiding the lease for non-payment under its terms. Therefore the status of the lease will depend on the court order at the termination of the proceedings and is not subject to conjecture at this time.

DEFAULTING LESSEE

(No. 12217—Commissioner of Public Works—J. E. S.—April 24, 1958.)

Your letter of recent date requested our advising whether, and by what methods, the City may secure possession of a building leased to Slick Airways, Inc., under indenture dated 12 June, 1956.

Under the provisions of paragraph 10 of said document, the City of Chicago is granted a full and free license to enter into and upon said premises, or any part thereof, to take possession thereof with or without process of law and to expel and remove lessee (Slick), or any other person who may be occupying the said premises, or any part thereof, and lessor may repossess itself of the said premises as of its former estate in the event Slick vacates or abandons the premises or permits the same to remain vacant or unoccupied for a period of 10 days, or in case of the nonpayment of rent.

This office has been advised by your department that Slick vacated said premises on 1 April, 1958 and has since said date permitted the same to remain vacant for a period in excess of 10 days and further, is in arrears in payment of rents and charges due and owing the City.

In view of the foregoing, this office is of the opinion that your department may immediately take possession of said premises and all buildings and improvements thereon without further process.

It is our further opinion that the provision in paragraph 2 of said indenture, concerning the removal by Slick, at its own expense, of all buildings constructed upon said premises during the term, is conditioned upon full performance of the terms of said contract. In the event of default, as in the instant case, any right thereunder would stand forfeit.

Attached hereto is copy of letter sent this day to Slick Airways, Inc.

Gentlemen :

Be advised that you are in default in payment of rent, fees and charges in the sum of \$30,165.71 for premises located at O'Hare Field, Chicago International Airport, as provided by indenture lease entered into by you and

the City of Chicago dated June 12, 1956, as extended, and that you have vacated and abandoned said premises on April 1, 1957 thereby allowing the premises to remain vacated and unoccupied for a period of ten days.

You are further advised that your right of possession of said premises and the improvements thereon has terminated and the City of Chicago has taken possession thereof.

TITLE OPINION — MEIGS FIELD

(No. 12247—*Airport Engineer—J. E. S.—August 13, 1958.*)

In connection with the above project application, and pursuant to your request, we submit the following opinion as to the right and interest of the City to use and occupy as a municipal airport a portion of the property located on Northerly Island and the submerged lands lying adjacent thereto and located in Sections 22 and 23, Township 39 North, Range 13, East of the Third Principal Meridian in Cook County, Illinois, otherwise known as Merrill C. Meigs Field.

The right and interest of the City of Chicago to use and occupy said premises is based on a lease and amendments thereof from the Chicago Park District, a municipal corporation, to the City of Chicago, a municipal corporation. Execution of said lease and amendments thereto was authorized by ordinance of October 8, 1946 (C. J. pages 6438-6440) as amended by ordinance of December 17, 1948, (C. J. page 6711), as further amended by ordinance of April 4, 1949 (C. J. page 3946), and is further amended by ordinance of September 14, 1955 (C. J. pages 971-972), copies of said ordinances being attached hereto.

Title to Northerly Island and the submerged lands lying adjacent thereto leased by the Park District to the City is vested in the Chicago Park District pursuant to an Act entitled "An Act to enable park commissioners having control of a park or parks bordering upon public waters in this state to enlarge and connect the same from time to time by extensions over lands and the bed of such waters, and defining the use which may be made of such extensions, and granting lands for the purpose of such enlargements", approved May 14, 1903 (Ill. Rev. Stat. 1945, Ch. 105, par. 92, *et seq.*).

Section 1 of said Act provides:

"That every board of park commissioners existing under the laws of this state, which has now, or may hereafter have or acquire control over any public park, boulevard or driveway bordering upon any public waters in this state shall have the power to extend such park, * * * by constructing a park * * * extending over and upon the submerged land and bed of such public waters, and over and upon any lands adjacent to or adjoining upon or penetrating into such waters * * *."

Section 4 of said Act provides:

"The title to any such extension or connection of such park or parks, boulevards, driveways and parkways, and to the bed thereof shall be, and hereby becomes vested in such board of park commissioners for public purposes, and the same shall thereby become a part of the public park or parks under the control of such board, and shall thenceforth be maintained and controlled by such board in the manner provided by law, for the government and maintenance of other parks, boulevards and driveways under its control, and in all cases where any boulevard, driveway or parkway is extended, or constructed, under the provisions of this act, the title to the submerged lands lying between the shore of such public waters, and the inner line of the extension of

such boulevard, driveway or parkway, shall be, and thereby becomes vested in such board of park commissioners for public purposes; and in case any such park, boulevard, driveway or parkway, extension or connection as provided in this act, shall be made into, over or upon the bed of Lake Michigan by any such board of park commissioners, then the right, title and interest of the State of Illinois in and to the bed of so much of said Lake Michigan shall be vested in such board of park commissioners as in other cases provided in this act, and for the same purposes and with the same rights and power."

The South Park Commissioners was a board of park commissioners existing under the laws of the State of Illinois having control of a public park bordering upon the public waters of the state and thus, under the provisions of said Act, had the right to extend the park by filling in the submerged lands of Lake Michigan, and upon so doing the title thereto vested in the South Park Commissioners.

Under the provisions of the Act in relation to the creation, maintenance, operation and improvement of the Chicago Park District, approved July 10, 1933 (Ill. Rev. Stat. 1945, Chap. 105, par. 333.1), the Chicago Park District was created in succession to the South Park Commissioners and became vested with all the rights and powers of the South Park Commissioners.

In 1935 the legislature passed an Act entitled "An Act to enable park commissioners, park boards or boards of park commissioners to grant, convey or release lands and rights to cities and villages for airport uses and purposes", approved July 11, 1935 (Ill. Rev. Stat. 1945, Chap. 105, para. 327c1). Said Act provides:

"That any park commissioners, park board or board of park commissioners which has heretofore acquired or shall hereafter acquire the title to any lands adjacent to or adjoining upon or penetrating into any public waters in this State or to the submerged lands and bed of such public waters, or any part thereof, or to any riparian or other rights may grant, convey or release any of such lands or rights to any city or village authorized to establish, maintain and regulate airports in, over and upon the public waters bordering thereon. Any such park commissioners, park board or board of park commissioners may grant, convey or release to any such city or village the right to construct and maintain causeways, roadways and bridges and any other appropriate approaches to or connections with any airport, landing field, airdrome or landing float of such city or village over and across any lands and property of such park commissioners, park board or board of park commissioners."

The Act above cited granted to the Park District the right to lease Northerly Island and the submerged lands adjacent thereto to the City of Chicago for airport purposes.

It should be noted that under Section 4 of the 1903 Act by which the submerged lands of the state were conveyed to the park district, title to such lands vested in the park commissioners for "public purposes". The operation and maintenance of a public airport by a municipality has been held by the Supreme Court of Illinois to be a public purpose so that there is no inconsistency between the Act of 1903 vesting title in the Park District and the Act of 1935 authorizing the Park District to lease said lands to the City of Chicago for the establishment, maintenance and regulation of airports.

A plat of the premises and copies of leases and agreements entered into by various operators at the Airport and the City will be transmitted to you upon request therefor by the Director of Aviation.

WATER FUND PROPERTY — LEASE FOR PARK

(No. 12356—Chairman, Finance Committee—J. C. M.—September 22, 1960.)

In connection with the ordinance authorizing the leasing of some eleven parcels of real estate, purchased with Water Funds over a period of many years, to the Chicago Park District for playground purposes, an opinion as to the legality of such leasing has been requested.

We are informed by the Commissioner of Water and Sewers that the parcels involved in the proposed leases are parcels of property that have been acquired by the use of Water Funds.

In an opinion rendered August 5, 1929 to the Commissioner of Public Works (Opinion No. 6485), the then Corporation Counsel ruled that properties acquired by the use of Water Funds could not be disposed of for the purpose of dedicating a street without compensation being paid to the Water Fund.

In another opinion rendered by this office, No. 9641, dated October 16, 1937, we held, in regard to properties acquired by the use of Water Funds, that the special charter of the City of Chicago of 1863 forbids the use or appropriation of the water fund to objects and purposes other than those for which the same was collected by the city from the consumers of water. This provision is applicable not only to money but to any property acquired for the waterworks.

In *People v. Hummel*, 215 Ill. 71, our Supreme Court held that the general Cities and Villages Act does not contravene the special charter of the City of Chicago of 1863, which forbids the use or appropriation of the water funds to objects and purposes other than those for which the same were collected by the City from the consumers of water.

When the Act in relation to the exchange of certain functions, properties and personnel among cities and park districts, approved July 5, 1957, became effective, the question as to what application, if any, it may have to parcels of real estate acquired by the City from the use of Water Funds, was fully discussed. It was the opinion of the Corporation Counsel that these parcels did not come under the jurisdiction of the City as parks, bathing beaches, bath houses and playgrounds so that the title could be vested in the Park District. The properties were not acquired for any such purposes and title and jurisdiction were not held by the City of Chicago for such purposes. The properties in question were acquired in connection with lands necessary for the construction of waterworks, the storage of pipes and the sinking of shafts in connection with the waterworks. The City of Chicago holds title to these properties in a trust capacity and they cannot be disposed of without compensation being paid into the Water Fund.

We are informed that for years these properties have been used for playgrounds and like purposes as the Water and Sewer Department had no immediate need for the use of said parcels.

In order to conserve the playground aspects of these properties, it is within the power of the City Council to lease these properties for such purposes to the Chicago Park District. In this way, there is no question but that the titles to these parcels remain in the City of Chicago and were not vested in the Chicago Park District at the time of the Consolidation Act. These parcels may be sold by the City of Chicago, but any proceeds from the sale thereof would have to be paid into the Water Fund Account.

TAVERN LOCATED ON ACQUIRED PROPERTY

(No. 12358—*Commissioner, Community Conservation Board—W. I. K.*
—September 29, 1960.)

Mr. W. W. McKenna on September 23, 1960 submitted a memorandum and a carbon copy of a letter dated August 19, 1960 from you to Mr. John C. Melaniphy re: tavern located on city owned property in the Hyde Park-Kenwood Urban Renewal Project.

In said letter you state that the city has become owner of certain properties therein listed, in which intoxicating liquors are sold. You state further your understanding that the law prohibits the sale of intoxicating liquors on or in any premises owned by the city of Chicago. Some question has arisen as to immediate discontinuance of such use.

You request advice as to your legal position in the matter and the proper course of action to follow.

Please be advised that Chapter 43, Section 130, Illinois Revised Statutes covers sale or delivery in buildings belonging to or under control of state or political subdivision—exceptions. The exceptions therein listed do not cover any buildings located in the Hyde Park-Kenwood Project. It is apparent that the sale or delivery of intoxicating liquors in properties acquired through condemnation proceedings in said project is illegal.

The acquisition of properties by the city through judgment order or purchase for project purposes establishes title in the city of Chicago without any strings attached as to rights of possession of other persons, lessees or otherwise.

It is suggested that care be taken to avoid a landlord-tenant relationship between the city and such lessee by attornment or acceptance of payment of rent for such use by the lessee.

The city may in enforcing its right to immediate possession petition the court for the issuance of a writ of assistance directed against the occupant of the premises to immediately turn over possession of such premises to the city. It may also sue in Forcible entry and detainer or ejectment.

B. WATERWORKS AND SEWERS

SEWER CONNECTIONS OUTSIDE CITY

(No. 11928—*Deputy Commissioner of Sewers—J. L. F. - F. S.—July 19, 1955.*)

Your letter of recent date brings into focus again the problem of the right of the City of Chicago to charge residents for sewer connections outside the city limits of Chicago, particularly with regard to the Village of Norridge.

Your letter states that the Village of Norridge has advised its citizens not to pay the sewer tax bills sent them by the Chicago Sewer Department,

and that the refusal to pay is based upon their contention that the City of Chicago renders them no sewer service, but that they derive said service from the Sanitary District of Chicago to which they allegedly pay taxes for these facilities.

Your letter further states that both of the hereinafter mentioned sewers were connected under authority of a *permit* at the time they were built and that no sewer service charge was required; that a later action of the City Council (C. J. pp. 3903-4, Aug. 21, 1945; revised and repassed Sept. 28, 1953, C. J. pp. 5699-5700), cancelled all previous permits for connections to City sewers from outside the city limits and began setting up a schedule of charges.

In the year 1940, the right of a city or other municipality to contract with a Sanitary District for sewage disposal was governed by Chapter 24, Sections 481 and 482 (Ill. Rev. Stats., 1939, in force at the time of the passage of the hereinafter mentioned ordinances), which states, among other things, that whenever any city shall be adjacent to any Sanitary District, said city may enter into a contract for sewage disposal with said Sanitary District upon such terms as may be agreed upon, which contract may be made by passage of an ordinance.

We are of the opinion, therefore, that sewer service connections for the specific areas in question were established by the City of Chicago and the Sanitary District involved not by *permit* as your letter indicates, but rather by virtue of the Council Ordinances of March 8, 1940 (C. J. pp. 2146-2148, incl.) and May 2, 1940 (C. J. pp. 2424-2426, incl.), granting perpetual easements to the Sanitary District of Chicago and the Norwood Park Sanitary District, respectively, pursuant to the statutory authority referred to in the preceding paragraph.

Under said ordinance of March 8, 1940, the Sanitary District of Chicago is granted a perpetual easement, right and authority for the construction, maintenance, operation and repair, etc. of a certain "Intercepting Sewer", 27 inches in diameter to be connected to the existing sewer of the City of Chicago at the intersection of Irving Park Road and Plainfield Avenue, into which latter City sewer is to be discharged sewage originating in the Norwood Park Sanitary District *solely* from the area bounded by Montrose on the north, Harlem on the east, Irving Park Road on the south and Ozanam Avenue on the west.

Under said ordinance of May 2, 1940, the Norwood Park Sanitary District is granted a perpetual easement, right and authority for the construction, maintenance, operation and repair, etc. of a certain "Intercepting Sewer", 54 inches in diameter, to be connected to the existing sewers of the City of Chicago at the intersection of W. Montrose Avenue and N. Narragansett Avenue, and an "Intercepting Sewer" of a diameter to be agreed upon by the Commissioner of Public Works and Norwood Park Sanitary District, at the intersection of N. Nagle Avenue and W. Foster Avenue, into which City sewers is to be discharged sewage originating in the Norwood Park Sanitary District *solely* from the area bounded on the north by the city limits, N. Harlem Avenue on the west, Forest Preserve Drive and W. Montrose Avenue on the south and N. Narragansett Avenue and N. Nagle Avenue on the east.

You have advised us that the Village of Norridge lies entirely within the areas bounded by said Council ordinances of March 8, 1940 and May 2, 1940, respectively, and that consequently the occupants of said Village who are receiving sewer facilities from the Sanitary District of Chicago and/or the Norwood Park Sanitary District directly and thus from the City of Chicago, indirectly, are presumably being served pursuant to the provisions of said ordinances.

Since said ordinances are silent on the question of compensation, if any, to be paid to the City of Chicago for said sewer facilities, we are of

the opinion that it may have been the presumed intention of the officials of the City, Sanitary District of Chicago, and Norwood Park Sanitary District at the time of the passage of said ordinances, to forego the payment of any charges to the City.

However, we are of the further considered opinion that, in 1940, the said officials could not have been presumed to anticipate the overwhelming housing shortage and the tremendous upsurge of residential construction commencing in 1945 at the conclusion of World War II. As a matter of fact, we have been informed that the Village of Norridge did not come into existence until its incorporation on February 2, 1949, and therefore it is extremely unlikely that its creation could have been anticipated in 1940.

As a consequence of the construction, in the entire suburban area of Chicago, of an extraordinary number of homes and other buildings requiring sewer service facilities, it necessitated the immediate availability of such sewage accommodations as a public health measure. Therefore, we assume the matter of providing sewer services was regarded of paramount importance, the aspect of payment therefor to be deferred for later consideration.

We therefore conclude that it is equitable to propose that the officials of the City of Chicago, Sanitary District of Chicago, Norwood Park Township Sanitary District and Village of Norridge jointly confer to formulate a revision of the terms of the Council ordinances of March 8, 1940 and May 2, 1940, respectively. From said conferences and negotiations, there should emerge provision for the payment to the City of Chicago of just compensation for all sewer service facilities rendered, directly or indirectly by the City of Chicago to all consumers within the Village of Norridge utilizing them since August 21, 1945 to the present time, as well as in the future.

TRANSFER WATER SUPPLY PERMITS

(No. 11966—Commissioner of Water and Sewers—J. L. F.—October 17, 1955.)

You recently called to our attention that the Prescon Corporation on November 7, 1952 made application for a water service connection to the City's 8-inch water main at the City limits in W. Birchwood Avenue at N. Kedzie Avenue to obtain a supply of water for an office and shop at 3201 W. Birchwood Avenue, Village of Skokie, Illinois.

Your said letter further indicated that the Village Clerk of Skokie had informed the City that said village had no objection to having said Prescon Corporation purchase water from the City since there were no utilities nearby in said village.

You further drew our attention to the passage of the Council Order on March 11, 1953 (C. J. pp. 4275-6), authorizing the Commissioner of Water and Sewers to issue a permit for said water supply to said Prescon Corporation, the applicant.

You advise us that the records of the Water Collection Division, Bureau of Water, show a permit to have been issued for said water service connection to said Prescon Corporation and that water was used thereupon.

Your letter further refers to the fact that on April 4, 1955, one Max Rosner, C. E. and Associates informed the City that they would like to have a final meter reading at 3201 W. Birchwood Avenue for Prescon, Inc., under the name of Arnold S. Rosner.

You further state that a field survey showed that the Prescon Corporation has vacated the property and that the National Brick Company will

accept water billing until F. H. Rechel, engaged in the cut-stone business, occupies the property. You mention that in a letter dated September 16, 1955, to the Commissioner of Water and Sewers sent by Mr. David Brandwein, attorney for the North Boundary Home Owners League, said attorney stated that since the Prescon Corporation had vacated the property, the continued use of water on the premises under the Council Order of March 11, 1953 appears to be without authorization.

Your letter recites the fact that City Council authority is required in all cases to furnish water supply at a point fixed by the Commissioner of Water and Sewers to consumers located outside the corporate limits of Chicago and to enter into an agreement or contract for a specified quantity of water at the City Ordinance rate for a definite period of time.

You submit the following questions and request us to render an opinion to you in answer thereof:

1. Does the Council Order apply only to the private person or corporation who makes or signs the prescribed application and enters into an agreement with the City of Chicago?

We are of the opinion that the Council Order applies only to the private person or corporation who or which makes or signs the prescribed application and enters into an agreement with the City of Chicago. Said opinion is based upon the provisions of Chapter 83 of the Municipal Code, Sections 83-1, 83-6 and 83-20 of which provide as follows:

"83-1. The provisions of this code for the installation in any building or structure in the City of any water pipe or pipes or systems of water piping which receives or is intended to receive, its service from the Chicago water works system shall be administered and enforced by the department of water and sewers (Amend, Coun. J. 11-10-52, p. 3415).

"83-6. *Application.* No person shall install in any building or structure in the city any pipe or pipes or systems of piping which receives its service from the Chicago water works system, nor shall make any alterations in, or additions or extensions to, any existing pipe or system of piping in any building or structure which was erected previous to August 3, 1938, until such person shall have made application to the department of water and sewers for permission for such installation, alteration, addition, or extension; provided, however, that wherever such installation or construction work is done, wherever an emergency exists for the purpose of preventing the loss or damage to property, such application may be dispensed with.

"*Application in writing.* All applications for permits for the installation in any building or structure, of water supply or water distribution pipes, or systems of piping, shall be in writing upon printed forms furnished by the department of water and sewers.

"*Service shut off until permit issued.* The Commissioner of water and sewers may withhold or shut off service from any building, structure, or premises, or to any portion thereof, in which shall be found any plumbing work, fixture, or any apparatus which has not been installed in accordance with the provisions of this chapter, until such plumbing work, fixture, or apparatus has been disconnected or until a proper permit has been issued (Amend, Coun. J. 11-10-52, p. 3415).

"83-20. No water main shall be tapped nor shall any service be installed, nor shall any connection be made with any service or supply pipe which is a part of the Chicago water works system, until an application, in writing, shall have been made to the commissioner of water and sewers, and until said commissioner has given his permission.

"Such application shall set forth a true legal description of the premises which it is proposed to serve, the name and address of the person about to perform the work and the size of the tap desired. It shall set forth fully the kind of building for which such service is intended and the applicant shall be required to answer all questions regarding such application which may be put to him by any officer or authorized employee of the department of water and sewers (Amend. Coun. J. 11-10-52, p. 3415)."

In addition, Chapter 185 of the Municipal Code covering water service to premises without the City has the following pertinent provisions in Sections 185-56.1, 185-56.2 and 185-56.3:

"185-56.1. The commissioner of water and sewers is authorized to supply city water at the city limits to private persons and corporations for premises outside the corporate limits of the city, but only when specifically in each case authorized so to do by order of the city council (Added. Coun. J. 8-21-45, p. 3904; amend. 11-10-52, p. 3415).

"185-56.2. Application for such service shall be made to the commissioner of water and sewers on a form prescribed by said commissioner. The application shall contain the name and address of the applicant, the location and description of the premises to be served, the quantity of water desired, and the period of time during which such service is desired, and the applicant shall in said application covenant and agree (1) to bear the entire cost of installing, operating, maintaining and repairing all connections, etc. * * * (7) to abide by and conform to all of the provisions of Chapter 83 of this code as though the same had been incorporated into and made a part of said application and made applicable to the supplying of city water to private persons or corporations for premises located beyond the corporate limits of the city, etc., * * * (Added. Coun. J. 8-21-45, p. 3904; amend. 11-10-52, p. 3415).

"185-56.3. Upon the approval of such application by the commissioner of water and sewers, said commissioner may authorize the issuance of a permit to tap the city's water mains at a location to be designated by him for the purpose of securing water supply for the premises of applicant, said permit to be issued to and the work therein authorized to be done by a bonded and licensed plumber in accordance with the ordinances of the city. The fee for issuing such permit shall be ten dollars for each connection of three inches or less in diameter and twenty-five dollars for each connection over three inches in diameter.

"Such permit shall not be transferred or assigned to another person (Added. Coun. J. 8-21-45, p. 3904; amend. 11-10-52, p. 3415)."

2. Has the City the right to refuse to supply water to any private person or corporation who has rightfully acquired by purchase or other means the water service pipe and premises of others who have been authorized by the City Council to obtain water from the City's mains?

In the light of the above and foregoing provisions of the Municipal Code, we are of the opinion that the City has the right to refuse to supply water to any private person or corporation who or which has rightfully acquired by purchase or other means the water service pipe and premises of others who have been authorized by the City Council to obtain water from the City's mains.

We are of the further opinion that before said purchaser is entitled to the privilege of procuring water supply from the City, said purchaser shall file a formal application for said water supply and council authority must thereupon be given for the issuance of a permit for said water supply to said applicant.

3. Must each and every private person or corporation who desires to receive or continue to receive water supply from the City of Chicago make its own application, secure proper City Council authorization and enter into an agreement with the City of Chicago for a specified quantity of water at the City Ordinance rate for a definite period of time?

In response to said query, we are of the opinion that in view of the above and foregoing provisions of the Municipal Code, each and every private person or corporation who desires to receive or continue to receive water supply from the City of Chicago must make its own application, secure proper City Council authorization and enter into an agreement with the City of Chicago for a specified quantity of water at the City Ordinance rate for a definite period of time.

Finally, we are of the considered opinion that the following concluding line of Section 185-56.3 specifically prohibits the substitution of one applicant for water service for another applicant by transfer or assignment:

"Such permit shall not be transferred or assigned to another person." (Emphasis ours.)

RIGHT TO PERMIT AFTER SPECIAL ASSESSMENT

(No. 12085—Commissioner of Public Works—J. R. B.—November 2, 1956.)

In your letter of recent date, you request our opinion as to the possibility of the Bureau of Sewers refusing a permit to connect into the Washtenaw Avenue sewer to a builder who expects to construct residences on the east side of California Avenue between 112th and 114th Streets.

Thomas D. Garry, Department of Sewers, states in his letter of September 7, 1956, to Alderman David T. McKiernan, that the frontage on California Avenue paid its proportionate share of the cost of the Washtenaw sewer the same as the frontage on other streets in the vicinity.

Please be advised that Chapter 24, Section 84-39, Illinois Revised Statutes, provides in part as follows:

"* * * Having found these amounts, it is the duty of such officer to apportion and assess the amount so found to be of benefit to the property, upon the several lots, blocks, tracts, and parcels of land, in the proportion in which they will be severally benefited by the improvement. But no lot, block, tract, or parcel of land shall be assessed a greater amount than it will be actually benefited. * * *

In the case of *Lawrenceville v. Hennessey*, 244 Ill. 464, at page 469, the Court stated:

"* * * Property not abutting on the line of a main sewer may be assessed to the extent of its benefits if it is within the defined limits of a district having the right to drain into the sewer, but some provision must be made securing that right to the property (*Mason v. City of Chicago*, 178 Ill. 499). Special assessments are based solely upon and justified by benefits to property, and property cannot be assessed for a sewer unless it is benefited by a present use of the sewer or by an assured future use of such a nature that the owner can enforce his right and thereby secure the benefits. * * *

We, therefore, are of the opinion that the City cannot tax a property owner in proportion to the benefits that the property owner receives from the public improvement and then deny that property owner that benefit and, therefore, we have no grounds to refuse a permit.

WATER CONSERVATION IN AIR CONDITIONING EQUIPMENT

(No. 12143—*Commissioner of Water and Sewers—W. M. Z.—July 19, 1957.*)

Please refer to your communication of June 26, 1957 which reads as follows:

"An opinion would be appreciated on the matter of whether the Department has authority for requiring conservation of water used in air conditioning equipment in premises receiving free water service or whether a Council ordinance is required for this purpose.

The increased use of water for air conditioning equipment has become a major problem in the Chicago water system, because of the high demands placed on the system during the hot weather season. Our studies show that the City is burdened with an annual fixed charge of \$43.20 for plant capacity required to supply non-conserved water for one ton of air conditioning. Under the present water rates, the annual revenue from such water usage is estimated at \$14.40 per ton of air conditioning.

It is, therefore, evident that non-conserved water usage for this purpose is considered extremely wasteful, since it is possible to reduce such usage by 95 per cent by the installation of water conserving equipment such as cooling towers or evaporative condensers. Studies are now under way and action is planned to control this problem by requiring: (a) installation of cooling towers, or (b) a demand charge for nonconserved use, or (c) a combination of both methods.

In the meantime, it is felt that we should prevent the wasteful non-conserved usage of water for air conditioning on all new installations of air conditioning in premises receiving free water service. It is our understanding that there are a number of large new projects of charitable and non-profit nature, such as hospitals, schools, and religious institutions, which will receive free water service and which are planning to install large tonnages of air conditioning capacity.

Section 185-47 of the City Code gives the Commissioner of Water and Sewers authority to limit the wasteful use of water in premises receiving free water service. We would like to have an opinion on whether the non-conserved use of water for air conditioning can be construed under this authority to be a wasteful use of water and whether the Department has authority to require installation of cooling towers or else make charges for the use of the water for this purpose. Must we have Council authority for such action?

It is planned to exempt from restrictions non-conserved air conditioning installations totaling less than five tons on any premises."

In reference to the above, may we call your attention to Section 185-47 of the Municipal Code of Chicago which refers to exemptions and which reads as follows:

"The Commissioner of Water and Sewers may exempt:

- (A) Property as is owned or used in the immediate conduct of carrying out of the purposes of any charitable, religious or educational institution.

* * * * *

"The Commissioner of Water and Sewers may fix such reasonable amount of water as he may deem to be sufficient for the requirements of said premises."

"All use of water in excess of said reasonable amount shall be paid for at the rate for metered water hereinafter fixed in Section 185-31."

It is our opinion that the Commissioner of Water and Sewers may fix what he deems a sufficient amount of water for all purposes including air conditioning, and after fixing the amount of free water, the balance used shall be paid for as fixed by Municipal Code, Section 185-31.

We do not believe that the Commissioner of Water and Sewers has the authority to require installations of cooling towers, however, we believe that his suggestion will be followed if the amount of free water is set.

It is not necessary that Council authority be had for such action of the Commissioner.

FURNISHING WATER TO NON-RESIDENTS

(No. 12169—Commissioner of Water and Sewers—W. M. Z.—October 17, 1957.)

Please refer to your letter of October 8, 1957, requesting an opinion with reference to whether or not the Commissioner of Water and Sewers of the City of Chicago is required, or has the authority to compel consumers located in the Village of Calumet Park, receiving water direct from the City's mains, to disconnect their water service and purchase their water from the Village.

We note from the copies of the letters attached to your communication that the problem involves three customers located within the Village of Calumet Park, who are receiving service by virtue of Council orders authorizing the connections in the years 1916 and 1918.

Our investigation discloses that there never had been formal contracts for service entered into with the consumers, and that the three parties whose names appear on our books are not the original persons named in the ordinance.

May we call to your attention an opinion rendered to you by this office on October 17, 1955, with reference to Water Service Connection to Prescon Corporation in the Village of Skokie, Illinois, which refers in part to the matter at hand, a copy of said opinion is herewith transmitted.

Our authority to sell water stems from our State Statutes, especially Section 348, which in part reads as follows:

"Any City, Village, or Incorporated Town located in any such Sanitary District, which owns a system of Water Works and procures its supply of water from a lake * * * shall furnish water to any other City, Village, Township, Incorporated Town, or other Municipal Corporation within the boundaries of such Sanitary District * * *."

The Statute makes no reference to the sale of water to private individuals outside of the City limits.

The question of furnishing water to private individuals was covered in our opinion addressed to the Commissioner of Public Works, dated February 24, 1915.

Our views with reference to tapping of water mains to serve property outside of the City, was again set forth in an opinion to the Commissioner of Public Works, dated February 16, 1927.

On August 23, 1932, an opinion was rendered and delivered to the Commissioner of Public Works, wherein in part we state as follows:

"The obligation of the City to furnish water to contiguous municipalities at the boundary line between them does not extend to private corporations; to supply water to private corporations at the boundary line would require negotiation and contract and an ordinance by the Chicago City Council authorizing the tapping of the water main at the boundary line."

Our opinion dated October 20, 1944, No. 10821, amongst other things sets forth that a non-resident has no inherent right to be supplied with City of Chicago water.

The Supreme Court of our State, in the case of *John S. Gage v. Village of Wilmette*, 315 Ill. 328, sets forth the doctrine that where no definite time is fixed during which an executory contract shall continue in force, it is terminable at the will of either party.

It is therefore our opinion that the Commissioner of Water and Sewers may disconnect the water service furnished private parties in the Village of Calumet Park at his discretion.

It is our suggestion that the customers be notified in writing that the water at the City mains will be shut off so that they may make arrangements with the Village of Calumet Park for service.

LIABILITY OF NEW OWNER FOR DELINQUENT CHARGES

(No. 12322—Commissioner of Water and Sewers—J. T.—February 17, 1960.)

In April 1959, Case No. TD 1273, in the County Court of Cook County, Illinois, the Court decreed to issue a tax deed to the Interstate Bond Company to extinguish the title of a former owner. On or about July 23, 1959, a writ of assistance was issued by said Court and the Bond Company conveyed said premises to the Southmoor Bank & Trust Company as Trustee under Trust No. 9910. The water charges which are the subject matter herein, had accrued under a former owner. The new owner is ready and willing to pay all water charges accrued since July 23, 1959, the date on which he entered into possession. It is further noted that the improvement on the subject lot was fire gutted and that since the last date it was rehabilitated and placed on the tax rolls.

The question herein submitted concerns the *liability of the new owner for water charges accrued against the former owner*. In *Rockford Savings and Loan Association v. City of Chicago* (352 Ill. 348), the Court stated:

"A charge for the use of City water is not a tax but a matter of contract and cannot be assessed against a subsequent purchaser who has had no notice of the delinquent charge against a former owner or tenant."

We at this time reiterate an instruction given your department on April 23, 1935 (Opinion No. 8752 JAS), where we stated:

"When water charges were legally incurred by the previous owner other than the present owner of the premises, and when a supporting affidavit has been filed, the charges accrued should be transferred to the suspense account, or collected from the previous owner."

In view of the fact that the former owner was deprived of his title in an involuntary tax foreclosure proceeding, and in view of the fact that the new owner is a bona fide purchaser for value, it is our considered opinion that the accrued water charges against the former owner cannot be collected from the new owner, and that the accrued charges should be transferred to the suspense account, or collected from the former owner. Further, the new owner should be charged and billed for all water charges accrued and due and owing to the City of Chicago, from July 23, 1959, to date.

Citations:

Rockford Savings and Loan Assn. v. City of Chicago, 352 Ill. 348.

Chicago v. Northwestern Life Insurance Co., 218 Ill. 40.

Corporation Counsel Opinion No. 8287—1-30-34.

Corporation Counsel Opinion No. 8752—4-23-35.

C. TAXATION OF CITY PROPERTY

TAX ON COMMUNITY CONSERVATION PROPERTY

(No. 12282—Community Conservation Board—W. D. G.—May 12, 1959.)

In answer to your request concerning the liability of the Community Conservation Board of the City of Chicago for general taxes on property acquired by the Community Conservation Board for the Hyde Park-Kenwood Project, please be advised that Chapter 120, Section 500 (6) Illinois Revised Statutes 1957, setting out the property exempt from taxation, provides as follows:

"500. PROPERTY EXEMPT FROM TAXATION. All property described in this section to the extent herein limited, shall be exempt from taxation, that is to say: * * *. (6) * * *: all property owned by any city or village located within the incorporated limits thereof, except such as heretofore has been leased or may hereafter be leased by such city or village to lessees who are bound under the terms of the lease to pay the taxes on such property. * * *."

It is our opinion that the property acquired by the Community Conservation Board for the Hyde Park-Kenwood Project will be exempt from taxation on the basis of the aforesaid statute. However, the exemption provision in the statute quoted above is not self executing. In order to exempt the property from taxation, it is necessary that the procedure set out in Illinois Revised Statutes, 1957, Chapter 120, Sections 594 to 600 inclusive be followed. If this procedure is not followed the only recourse is to file an Injunction Suit in the Circuit or Superior Court to restrain the County Treasurer from the collection of taxes for the year in question and to remove the property from the tax rolls.

The aforesaid method of exemption only applies when the property has been acquired prior to April 1st of the year in question. On April 1st, the tax for the year becomes a lien on the property and, all property acquired on or after that date is taxable for the current year. Our procedure for taxes of this type is to prorate the taxes as of the date of acquiring the property when a sale is consummated and closed through an escrow. The grantor pays the City of Chicago the amount of taxes that accrue during the period of his ownership on the basis of the last tax bill, and the City pays the taxes for the entire year when they become due. This problem does not arise however, when a Judgment Order is entered in a condemnation proceeding, because deposit is then made with the County Treasurer and he deducts the tax due from the amount deposited as just compensation for the property.

CHAPTER XII — CONTRACTS

A. BIDS AND AWARDS

LOCAL IMPROVEMENT BIDDING

(No. 11883—*Purchasing Agent—J. F. O.—February 18, 1955.*)

In your letter of recent date, you state that you received a requisition signed by the President of the Board of Local Improvements regarding advertising and taking of bids for sidewalk construction in 103rd Street to be charged to Appropriation Account No. 463-X-40 Street Improvement Bonds of 1927. You further state that bids were received by you on February 4, 1955 and are now under consideration. You also state that one of the bidders complained that the Board of Local Improvements advised bidders that the permit, inspection fee and the charge for water used, which are usual requirements in this instance, would not be required.

You request our opinion as to the following:

1. Whether this need of the Board of Local Improvements, where street improvement bonds are involved, comes within the jurisdiction of the Purchasing Agent with respect to taking bids and letting contracts;
2. Whether the inspection fees and water charges shall prevail; and
3. Whether the Purchasing Agent can make a recommendation (should you so hold under Question 1) under the specific circumstances of this invitation to bid.

Your requests will be answered in the same order in which you asked them.

1. It is our opinion that the requisition of the Board of Local Improvements was properly addressed to you and comes within the jurisdiction of the Purchasing Agent with respect to taking bids and letting contracts. The exception in Paragraph 22A-20 of the Purchasing Act (Chap. 24, Par. 22A-20, Ill. Rev. Stats. 1953) applies only to construction pursuant to the Local Improvement Act (Chap. 24, Art. 84, Ill. Rev. Stats. 1953). In the present instance the Board of Local Improvements is to act in a supervisory capacity only and the construction under consideration is not pursuant to the Local Improvement Act.

2. It is further our opinion that the successful bidder would be required not only to take out a permit and make the deposits required for inspection fees and water but would have to comply with all of the requirements of Chapter 33-47 and 48 of the Municipal Code of Chicago unless said compliance would be excused by an ordinance of the City Council.

3. It is further our opinion that the Purchasing Agent is required to recommend by Paragraph 22A-10 of the Purchasing Act (Chap. 24, Par. 22A-10, Ill. Rev. Stats. 1953) which states:

"All contracts which are required to be approved by the corporate authorities shall be approved in accordance with the recommendations of said Purchasing Agent unless the recommendations are rejected by the corporate authorities, * * *".

It is, therefore, our opinion that regardless of the complaint voiced by one of the bidders, the provisions of the Municipal Code above cited and the specifications submitted to the bidders as part of Contract Documents Numbered 80.69-55-1 control as to the necessity for including in the computation of bids the items therein contained. Oral representations would not be sufficient legally to vary the above.

Therefore, it is your responsibility either to reject all bids or to recommend to the City Council that the lowest bid be accepted.

REDUCTION OF UNIT PRICE

(No. 11884—Airport Consultant—J. C. M.—February 21, 1955.)

With your letter of February 21, 1955 you transmitted a copy of your recommendation made to Mr. John F. Ward, Purchasing Agent for the City of Chicago, concerning the award of Contract No. 12, O'Hare Field, Chicago International Airport.

In your recommendations to Mr. Ward you state that the Rock Road Construction Company of Chicago was the lowest of the eleven bidders to bid on this project at an estimated cost of \$1,319,602.00 and in your opinion that lowest bidder is fully qualified, from experience, equipment and financial ability, to satisfactorily complete the work. You note, however, that under items 4a and 4b compacted granular fill was to be used, some of which was material on the site of the airport and other, if necessary, to be furnished by the contractor from other sources. You note that under 4a there was an estimated quantity of 71,000 cubic yards of material on site and the low bidder bid a unit price of 85¢ or a total of \$60,350.00 and that under 4b there was an estimate of 24,000 cubic yards of material to be furnished from other sources and the low bidder gave a unit price of 1¢, making a total of \$240.00, or a grand total under the bid of \$60,590 for this material to be furnished under items 4a and 4b. You further state that it is entirely possible that the material required under items 4a and 4b, or 95,000 cubic yards, might be obtained from the material on site and the specifications provide that if the material on site is found suitable in sufficient quantity, it will be used instead of securing material from other sources.

Under these circumstances, if the bid as presented were accepted, the City might be called upon to obtain all the material under item 4a and thus involve the City in a greater expenditure than estimated in the low bid. For that reason you suggest that the unit price under item 4a be reduced from 85¢ to 63.8¢ per cubic yard so that in the event all of the material is supplied under item 4a, the total payments to the contractor would not exceed the totals shown by the bid under items 4a and 4b.

You ask for our opinion as to whether this change in unit price as to 4a would materially affect the contract proposal so as to imperil a contract based thereon.

As we understand it, your proposal is merely to lower the unit price on item 4a from 85¢ to 63.8¢ per cubic yard so that if all of the material were furnished under item 4a, the price would not exceed the estimated total included in the low bid under items 4a and 4b.

In an opinion rendered by the Corporation Counsel on July 21, 1916 (Vol. 10 Ops. Corp. Coun. p. 23) a situation arose wherein the lowest bid on a project was \$54,500.00 and the City's estimate for this work was \$50,000.00. Rather than require the City to re-advertise for bids, the lowest bidder agreed to accept the contract to do the work for the sum of \$49,-

975.00 and the question was posed to this department as to whether contract could be so let. In that opinion we said:

"* * *. The Northwestern Terra Cotta Company, being the lowest and best bidder, we cannot perceive how any one can possibly be injured if the Northwestern Terra Cotta Company reduces its bid so as to come within the city's estimate, and then enters into a contract to do the work for this reduced amount. And obviously, the city will be benefited by following this course.

"This position is, we think, sustained by the case of *The Sanitary District of Chicago v. McMahon & Montgomery*, 110 Ill. App. 510, in which the court, on page 519, said:

'In contemplation of law Green's Dredging Company was not a bidder, because its bid did not conform to the advertised requirements. The contract was let to the next lowest bidder, McMahon & Montgomery Company, at a price less than its bid, without any re-advertising, and it is now claimed that this avoided the contract. No authorities are cited to sustain the contention. If (so far as this point is concerned) it was lawful to let the company have the contract at the price (twenty-three cents) bid by it—and this is not denied—then it was not contrary to the statute, or to public policy, or to the duty appellant owed to the public, for its trustees, by persuasion, to induce that company to consent to a reduction of the price from twenty-three cents to twenty-one cents.'

We, therefore, are of the opinion that reduction in the unit price under item 4a and the awarding of the contract to Rock Road Construction Company of Chicago in line therewith is perfectly legal and justifiable.

CORRECTION OF BID ERROR

(No. 11891—Purchasing Agent—J. C. M.—March 30, 1955.)

With your letter dated March 25, 1955 you transmitted a copy of a bid submitted by Mr. C. H. Bliervnicht, of Oak Park, Illinois, for furnishing one (1) ambulance for the Fire Department of the City of Chicago under Specifications and Contract Documents No. 22-55-44.

The Proposal provided the bidder is "to furnish and deliver one (1) new ambulance and accept in trade one (1) city owned ambulance." There is a figure of \$8,839.00, which you and the bidder consider the "trade in value", and a bid of \$8,000.00 being the "Balance due after trade-in."

On page 6 of the "General Conditions" we find the following:

"Basis of award. Bids will be canvassed on the basis of balance due contractor."

You advise that the bidder "stated he intended to make 'trade-in allowance' \$839.00, instead of \$8,839.00 as written in the proposal."

You request our opinion as to the legality of the bid. It is apparent that the bidder made a mistake in inserting the figure \$8,839.00 on the line which you both consider was for the "trade-in value" to be allowed by the bidder. There is no characterization given to this line but we assume your interpretation is correct. The important factors in this bid are that the bidder is to receive one (1) city owned ambulance and to furnish a new ambulance to the City upon payment of \$8,000.00. The provision that "bids

will be canvassed on the basis of balance due contractor" remedies any ambiguity and is the controlling factor.

In an opinion rendered by this department on May 9, 1919 (Vol. X p. 814, Op. Corp. Counsel) we stated that a correction of a manifest error of fact or arithmetic appearing on the face of a bid could be made.

In *City of Chicago v. Mohr* (1905), 216 Ill. 320, the court held that the municipality could not "permit *material amendments or changes* to be made in terms or conditions of the bids" and therein considered, not unfavorably, a case where the court held that an obvious mistake appearing on the face of the bid might be rectified.

We are therefore of the opinion (1) that the mistake is not a material one which affects the entire proposal and (2) that the amount that the City is to pay for the new ambulance under the proposal is not affected by the error, nor is the City injured by its correction (*Sanitary Dist. of Chicago v. McMahon & Montgomery*, 110 Ill. App. 510, 519).

We venture to suggest that in the preparing of future proposals as contained on page "P-1" that you clearly indicate that the first line is to express the "trade-in value" in a similar manner as you have indicated that the second line is for "balance due after trade-in."

NON-COLLUSION AFFIDAVIT

(No. 11917—*Purchasing Agent—J. C. M.—June 27, 1955.*)

In your letter of June 24, 1955 you request our opinion as to the legality of a bid received on the above subject, wherein the bidder did not execute the non-collusion affidavit.

Chapter 24, Section 22A-8 of the Illinois Revised Statutes (1953) provides as follows:

"Any agreement or collusion among bidders or prospective bidders in restraint of freedom of competition by agreement to bid a fixed price, or otherwise, shall render the bids of such bidders void. Each bidder shall accompany his bid with a sworn statement, or otherwise swear or affirm, that he has not been a party to any such agreement."

Section 22A-19 of that chapter provides as follows:

"Any purchase order or contract executed in violation of this Article shall be null and void as to the municipality and if public funds shall have been expended thereupon the amount thereof may be recovered in the name of the municipality in an appropriate action instituted therefor."

From the mandatory provision of the statute and the further provision that any contract entered into in violation of the provision of the statute shall be null and void and that any funds that have been expended on such a contract may be recovered, we are of the opinion that the bid in question is not in compliance with the statute and should not be considered by your office.

ICC CERTIFICATION FOR TRUCK-HIRE

(No. 12016—Purchasing Agent—J. P. D.—February 24, 1956.)

In your letter of February 16, 1956 you requested an opinion as to whether the Illinois Motor Carrier of Property Act, as amended 1955, directly affects the current Truck Hire Agreement, Form CP 70.

We are of the opinion that all truckers making bids under the present "Truck Hire Agreement" should register or file application with the Illinois Commerce Commission. These truckers do not come within the exemptions, as stated in Section 3, of the Illinois Motor Carrier of Property Act, therefore unless they comply with the Act they shall be subject to fine as stated in Section 18 of the Act.

We are also of the opinion that holders of "Truck Hire Agreements," will not be bound by tariffs established by the Illinois Commerce Commission, and the compliance with the Illinois Motor Carrier of Property Act will in no way interfere with or obviate public bidding.

It is our further opinion however, that the City should issue an addendum to the effect that only the bids of those truckers who can produce a certificate issued by the Illinois Commerce Commission, indicating a compliance with the Act by the bidder, will be qualified to bid for "Truck Hire Agreements."

MISTAKE ON FACE OF INSTRUMENT

(No. 12207—Purchasing Agent—F. F.—February 25, 1958.)

We have your recent letter concerning the above mentioned subject in which you stated that upon submission to the State of Illinois this contract was rejected for the reason that there was an error in the extension of the unit price for Item 1-B on page 7 of the Schedule of prices.

You also transmitted parts 1 and 2 of the related Specification and Contract Documents together with a copy of Commissioner De Ment's letter recommending that the contract be awarded to Healy Bros. and Company in the amount of \$1,619,489.00, computed upon the unit and lump sum prices contained in this proposal.

You stated that the "\$2.59" per foot for Item 1-B on page 7 was a glaring error and the figures should have, in fact, been "\$259.00 and Two Hundred Fifty-Nine Dollars and no cents" as indicated by the extension quantity times price figure of \$942,760.00 as set forth on aforesaid page 7.

You requested our opinion as to whether or not the State was correct in its contention as to Item 1-B.

We have reviewed the above enclosed documents and we are of the opinion that the contract was properly awarded to Healy Bros. & Co. since it is a fundamental rule of law that where there is an obvious mistake made on the face of an instrument, which is corrected by other expressions therein, then the whole instrument is to be considered and construed according to the evident intent of the parties as manifested by all the language used.

We are therefore of the opinion that the contract was properly awarded to Healy Brothers on the basis of the amount of "Two Hundred Fifty-Nine Dollars and no cents" ("(\$259.00") per foot for Item 1-B on page 7 of the Schedule of prices as corrected by the communication of Healy Bros. & Company, dated December 20, 1957.

PURCHASE FOR "EVALUATION" PURPOSES

(No. 12257—Purchasing Agent—W. V. L.—October 27, 1958.)

In your letter of September 9, 1958, you request our opinion as to the legal way to purchase one Mack Truck Chassis without advertising for bids, the estimated cost of the Chassis being \$6,900.00. With your request you attached a copy of a letter from the Commissioner of Streets & Sanitation addressed to you, in which he stated that the truck chassis would be for "evaluation purposes with respect to chassis furnished by other manufacturers." The letter further states "to evaluate the unique features and craftsmanship here presented, and to determine acceptability for Bureau of Sanitation refuse collection purposes, this purchase is very desirable."

The question you ask is covered by Section 22-A-4 of the Purchase Act and requires an interpretation of that Section. The pertinent portion reads as follows: "contracts which by their nature are not adapted to award by competitive bidding, such as contracts for the services of individuals possessing a high degree of professional skill where the ability and appearance of the individual plays an important part, contracts for printing of Finance Committee pamphlets, Comptroller's estimates and departmental records * * * shall not be subject to the competitive bidding requirements of this article."

We are of the opinion that the language following the words, "such as" are not restrictive of the objects for which no bids are to be taken because if such a restrictive meaning were given then bidding would be required whenever repair parts, accessories, equipment or services are required for equipment or services previously furnished or contracted for and which can be obtained from only one source, as in the case of a manufacturer who is the sole source of supply for repair parts for machines he has made and sold to the city.

If you concur with the opinion of the Commissioner of Streets and Sanitation that the Mack Chassis is for evaluation purposes only, then we are of the opinion that you have the authority to purchase it without advertising for bids. However, if, at some later date, should the city desire to purchase additional chassis, it will then be necessary that specifications be prepared to invite competitive bidding.

ADVERTISING FOR BIDS

(No. 12265—Purchasing Agent—E. W. P.—January 19, 1959.)

We have your request for an opinion as to the interpretation of Chap. 24, Par. 22A-7 of the Illinois Revised Statutes, which provides as follows:

"All proposals to award purchase orders or contracts involving amounts in excess of \$2,500.00 shall be published at least ten days, excluding Sunday and legal holidays, in advance of the date announced for the receiving of bids, in a secular English language daily

newspaper of general circulation *throughout such municipality* * * *. Nothing contained in this section shall be construed to prohibit said purchasing agent from placing additional announcements in recognized trade journals * * *. Provided, that an extension of time may be granted for the opening of such bids upon publication in a secular English newspaper of general circulation *throughout such municipality* of the date to which said bid opening has been extended." (Italics supplied.)

The above paragraph is contained within the Article in the Illinois Revised Statutes designated as Municipal Purchasing Act for cities in excess of 500,000 population added by act approved July 21, 1947.

The above language in our opinion was used in this legislation in view of the prior decision of the Supreme Court, State of Illinois, contained in 372 Illinois, 459, entitled *The People, ex rel. John Toman, County Collector, Appellant, v. 110 S. Dearborn Street Building Corporation, Appellee*, filed December 12, 1939. In that case the question was raised as to the adequacy of publication in the Daily Calumet of an appropriation ordinance of the Board of Commissioners of Cook County. The pertinent statute, 1935, Chap. 100, Par. 5 provided that when any notice was required by law or contract to be published in a newspaper that it should be a secular newspaper of general circulation published in the city, town or county, or some paper specially authorized by law to publish legal notices in the city, town or county. It was urged in that case that the circulation of the newspaper must not be limited to a small portion of the municipal area but must be general throughout. This contention was sustained by the trial court.

The Supreme Court reversed the trial court and held that the use of the words "general circulation" by the legislature intended that of a general newspaper as distinguished from one of a special or limited character; a newspaper that circulates among all classes and is not confined to a particular class or calling in the community. The Court said:

"The statute with respect to publication of notices does not require it to be in a newspaper of general circulation *throughout the municipal area* but, on the contrary, provides that such paper shall be a secular newspaper of general circulation published in the City. To require proof that a newspaper for publication purposes has a general circulation *throughout the area of the city* * * * is to require something that is not in the statute. The statute only requires that the circulation be general and this court has defined precisely what the term 'general' means."

In your letter you construe the term "general circulation"; however, the words to be construed in light of the language in the statute and the Supreme Court decision quoted above should be "general circulation throughout such municipality" and it is our opinion that the definition that you quote satisfactorily covers the specifications and advertisement for bids for the employment of a newspaper to carry official city advertisements. We repeat your definition:

"A newspaper with a large total audited paid circulation, sold and purchased by people living in all parts of the City, offered for sale at all newsstands and news outlets throughout the City, being a newspaper not confined to any specific segments of the population or to specific geographical areas of the City, as filed with the Audit Bureau of Circulations."

There have been a number of previous opinions, all of them prior to the Supreme Court decision quoted in this letter and to the Municipal Purchasing Act of 1947. These prior opinions were limited to the words "general circulation" and followed the reasoning of the cited Supreme Court decision.

MISTAKE IN BID — CLERICAL

(No. 12273—Purchasing Agent—E. W. P.—March 31, 1959.)

We have your letter of March 17, 1959, to which you attach a letter from Standard Oil Company of Indiana, referring to a bid which it presented on March 2, 1959 for your gasoline truck, delivery need. You also attach a copy of the tabulation of bids for that need, and you request our opinion as to the legal status.

Your tabulation indicates that the Standard Oil Company was the lowest bidder in satisfaction of the provisions of Sections 22A-3, 22A-7 and 22A-10 of the Municipal Purchasing Act. Standard Oil advises in their letter of March 13, 1959, that the bid which it made and which was duly opened with other bids and proclaimed by your department as the low and successful bid was not authorized or intended by the management, and it was due to a serious clerical error which overlooked the requirement which advised the bidder to include the State of Illinois Motor Fuel Tax in the bid. Standard now requests that it be permitted to withdraw its bid.

After explaining the reasons, which, in the opinion of the Standard Oil Company, would make it economically impractical to bid the amount which was contained in its own bid, Mr. R. E. Fowler writes on behalf of Standard Oil Company in the last two paragraphs of the letter of March 13, 1959 as follows:

"From the foregoing, it is apparent that Standard would not intentionally bid 8.4¢ per gallon (13.4-5¢) for tank wagon delivery when on the same day we bid 12.69¢ for tank car-transport truck delivery.

Standard therefore respectfully requests that it be permitted to withdraw its truck delivery bid (No. 11-59-11) and that its bid deposit, applicable thereto, be returned."

It is apparent from the history of this transaction which culminated in the acceptance of the bid of Standard Oil Company that all requirements of Chap. 24, Art. 22A of the Illinois Revised Statutes were complied with. 22A-2 and 22A-3 of the Act places upon the City the duty and the obligation in the purchase of materials, equipment and supplies involving amounts in excess of \$2,500.00 to conduct the proceedings by free and open competitive bids after advertisements and make the award to the lowest responsible bidder. The requisite publication containing the full description of the character of the proposed contract was made complete in every respect to enable the bidder thereon to know exactly the obligations he was undertaking. It further appears that the requisite bid deposit was made by Standard Oil, and that all of the elements of a valid, binding contract are present. Both the City of Chicago and the Standard Oil are bound by the contractual obligation which culminated on March 12, 1959, the date that the bids were opened and the name of the successful bidder and contract award announced.

There is no provision in the Act whereby the City may release Standard Oil and accept the next lowest bid, even though the next lowest bidder was agreeable. It is our opinion that the alleged mistake of fact is not sufficient to rescind the contract. There is no mistake of fact where the mistake results from the neglect of legal duty to exercise care. "*Purvines v. Harrison*, 151 Ill. 224." Equity will not rescind a contract for a mistake which could have been prevented by the exercise of reasonable diligence and care. "*Douglas v. Littler*, 88 Ill. 350", "*Steinmeyer v. Schroepfel*, 226 Ill. 9." In the *Steinmeyer* case where the plaintiff made a mistake in adding up his computations the Court said:

"If it can be set aside on account of the error in adding up the amount representing the selling price, it could be set aside for a mistake in computing the percentage of profits which appellants intended to make, or on account of a mistake in the cost of the lumber to them, or any other *mistaken calculation on their part*. If equity would relieve on account of such a mistake there would be no stability in contracts."

There is a case reported in 234 Ill. at page 114, *Bromagin v. The City of Bloomington*, where it was apparent from the evidence that great haste was necessary on the part of the successful bidder in calculating the amount of the bid in order that it might be prepared and delivered within the time limit. The Court there held that sufficient negligence was not shown to bar equitable relief. It was shown in that case that the City Engineer, who was a member of the Board who opened the bids, knew that the mistake was made and acquainted the other members of the Board with the mistake, and that the Board accepted the bid knowing that a mistake had been made. Furthermore, in that case it did not appear that the City of Bloomington could not accept some one of the other bids made. The *Bromagin* case, therefore, differs in its essential facts from the facts that we have before us in the present instance.

We are, therefore, of the opinion that Standard Oil of Indiana is bound and that it is incumbent upon it to perform the contract which has been awarded to it in accordance with the statutory provisions. The City has no alternative except to demand performance.

BID CHECK NOT CERTIFIED

(No. 12300—Purchasing Agent—J. C. M.—October 9, 1959.)

In your letter of September 30, 1959, you request an opinion as to whether or not you may entertain a bid where the deposit check received with the bid of the lowest bidder was not certified. In your letter you refer to a recent opinion of the Superior Court of New Jersey, Appellate Division, where the court held that the failure to have the check certified is not such a material departure or substantial non-compliance as will prevent award of the contract.

We are in accord with such opinion and believe that you have the discretion to permit a lowest bidder, otherwise qualified, an opportunity to have the check certified or your office could have it certified if a local bank is involved.

CLERICAL ERROR IN BID

(No. 12306—Purchasing Agent—J. G. O.—December 11, 1959.)

We are in receipt of your letter dated November 23, 1959, concerning bids that were taken for 100 snow plows on November 20, 1959, which had attached a copy of a proposal submitted by George G. Anderson & Company, Inc., indicating that said company bid Forty Seven Thousand Three Hundred Dollars (\$47,300.00 each) for 100 snow plows. You also attached a letter from George G. Anderson & Company, Inc., dated November 20, 1959, which advised you that due to a clerical error the firm submitted the price of \$47,300.00, although they intended to bid \$473.00 for each of the 100 snow plows. The company asks you to conform their bid to their intention.

It is a fundamental rule of law that a bid may not be altered after it has been opened and where a mistake is not apparent on the face of an instrument, even the court will not disregard the mistake and read the instrument as supposedly intended by the parties. Ordinarily, it is essential that a mistake of fact in a written instrument be mutual in order to justify reformation of that instrument and even though a unilateral mistake may sometimes afford ground for cancellation or rescission of an instrument, it is the general rule that it is not ground for its reformation. Hence, it is our opinion that the bid of George G. Anderson & Company, Inc. is not acceptable.

CORPORATE AND NOTARIAL SEALS

(No. 12317—Purchasing Agent—J. G. O.—January 29, 1960.)

We are in receipt of your letter of January 21, 1960, which had attached a copy of the proposal page under the subject contract whereon the signature of W. N. Barr, Jr., Vice-President of the Warren Barr Supply Company, is affixed. The attestation of the corporate secretary is indicated by his signature thereon, though the corporate seal has not been affixed and the signature of a notary public is also in evidence under the usual phraseology "subscribed and sworn to before me", though there is no notary seal.

This proposal is a legal one since an Act of the General Assembly, approved July 11, 1951, abolished the need for private seals on written contracts, deeds, mortgages or any other written instruments or documents, as follows:

"The use of private seals on written contracts, deeds, mortgages or any other written instruments or documents heretofore required by law to be sealed, is hereby abolished, but the addition of a private seal to any such instrument or document shall not in any manner affect its force, validity or character, or in any way change the construction thereof."

Further, our Supreme Court, in the case of *Stout v. Slattery*, 12 Ill. 162, held that a notarial seal was unnecessary on an affidavit made before a notary public of a county in which was pending the case in which the affidavit was given and it is our belief that the opinion in this case is still the law in the State of Illinois.

We advise you that you continue your practice of requesting the corporate and notarial seals inasmuch as they are prima facie evidence of the authority of the respective officers.

NOTARY PUBLIC JURAT

(No. 12318—Purchasing Agent—J. E. S.—January 29, 1960.)

Your letters of January 26 and January 27, 1960, concerning the above cited contract have been received in this office with a request that we advise whether or not a particular proposal, properly prepared but devoid of a Notary Public Jurat, can be otherwise accepted.

The letter dated January 27, 1960 states that the bidder has proposed to fly the notary public to Chicago in order to complete the jurat; that said notary public was present at the time the proposal was executed but he at that time failed to complete same.

Be advised that if there be no proof on the face of the paper that an oath was duly administered, as in the instant case, the fact may be established by evidence aliunde.

"This rule is clearly just because after a party has in fact made or procured to be made the necessary declaration under oath he ought not to be prejudiced and the proceeding ought not to fail in consequence of the officer's neglect to affix a jurat" (*James v. Logan*, 108 P. 81).

"The jurat or certificate of the officer administering the oath is not a necessary part of the affidavit, and it may be shown aliunde that the statements in the affidavit were in fact made as they purport to be,—on oath duly administered by an authorizing officer."

Cox v. Stern, 170 Ill. 442.

People v. Black, 281 Ill. 227.

Thus, in the absence of evidence showing disclosure in advance of the opening of bids, of the terms of the bids submitted in response to the advertisement, and subject to your factual determination that the omission of subject jurat was merely neglectful, it is our opinion that said bid may be accepted.

Upon completion of the jurat, transmit cited contract to this department for our further action.

B. EXECUTION AND INTERPRETATION

FAIR TRADE LAWS

(No. 11913—*Purchasing Agent—E. W. P.—June 15, 1955.*)

We have your letter of May 17, 1955, in which you request an opinion as to the responsibility of the Department of Purchases, Contracts and Supplies of the City of Chicago, with respect to Fair Trade Laws.

You enumerate in your letter the receipt of bids for spark plugs and advise that since the bids have been received, the low bidders have orally stated that Fair Trade prices of plugs have been revised and that they will be unable to support their offers.

You wish to know, if it is incumbent upon the City to ascertain the Fair Trade prices of commodities we are purchasing to see that contracts are awarded in conformity with the Fair Trade Laws, and (2) if contracts are awarded to low bidders who have offered prices in violation of the Fair Trade Regulations, is the City in violation of the Fair Trade Laws in accepting and awarding contracts based on prices received in response to formally advertised invitations to bid, or which governs, the Fair Trade Laws or the Purchasing Act.

Chapter 121½, Sections 188-191, both inclusive, relate to the protection of trade marks and brands and provides that any person advertising, offering for sale, or selling commodities, which are governed by the provisions in the Act relating to trade mark brands, etc., and contracts therefor at less than the price stipulated in the contract, is engaged in unfair competition, and that action may be maintained at the suit of any person damaged thereby.

It is our opinion that this Act does not in any way apply to the consumer, and that it is not incumbent upon the City to ascertain the Fair

Trade prices of commodities which you are purchasing to see that contracts are awarded in conformity with the Fair Trade Laws. It is our opinion that if contracts are awarded to low bidders who have offered prices in violation of the Fair Trade Regulations, the City is not in violation of the Fair Trade Laws in accepting and awarding contracts based on prices received in response to formally advertised invitations to bid. The Purchasing Act governs, and it is our opinion that you may feel free to purchase commodities for the City of Chicago at the price most advantageous to the City, without making any inquiries as to the application of the protection of trade marks and brands under the Statutory Act.

There is, however, another problem to be resolved in the enforcement of the contract by the City against the seller. There is a provision in the Act which exempts the advertiser or seller where the contract or agreement relates to any commodity for *library* purposes under Section 190. The advertiser or seller in the instances that you relate in your letter might be liable to damages because of unfair competition at the action of the person damaged, but in our opinion he could not interpose a defense of the Fair Trade Laws against the City on an action for specific performance of the contract by the City.

COMPTROLLER'S CONTRACT RESPONSIBILITIES

(No. 11960—City Comptroller—J. C. M.—September 27, 1955.)

With your letter dated September 7, 1955, you transmitted purchase order CN 4783 for \$324,720 addressed to Efengee Electrical Supply Company for Circuit Cable in accordance with specifications No. 9-55-46, Lot No. 2A and bid of August 4, 1955, and purchase order CN 4784 for \$554,850 addressed to United States Rubber Company for braid covered cable in accordance with specifications No. 9-55-46, Lot No. 1 and bid of August 4, 1955 and you requested our opinion as to whether such purchase orders are in such form as contracts, to be approved by the Mayor and Comptroller as provided by the Purchasing Act (Chap. 24, Article 22A, Ill. Rev. Stat. 1953, as amended).

It is our opinion that formal contracts covering the subject matter, the specifications, the advertisement, the bid, the time of performance, and the account to be charged, should be prepared by the Purchasing Agent and executed by the Seller. The performance bond with surety, duly executed should be transmitted to the Corporation Counsel with the proposed contract for his approval as to form and legality before the contracts are submitted to you and the Mayor for approval. We do not deem the purchase orders in question to be a compliance with the statutory requirements as the amounts involved exceed \$2,500.00.

Section 22A-10 of the Purchasing Act provides, in part:

"The award of any *contract* involving amounts in excess of \$2,500 shall be made by the purchasing agent to the lowest or highest responsible bidder as provided in Section 22A-3 of this Article. Every *contract* involving amounts in excess of \$2,500 shall be signed by the Mayor or his duly designated agent, by the Comptroller and by the purchasing agent, respectively, of such Municipality. * * *

All *purchase orders or contracts involving amounts* of \$2,500 or less shall be awarded by the purchasing agent * * * and shall be signed by the purchasing agent and by the Comptroller."

It will be noted that where more than \$2,500 is involved the statute provides for awarding a *contract*. This document should be a formal con-

tract so that all provisions concerning the award are before the Mayor and Comptroller before they sign. Where the amount involved is \$2,500 or less, the statute provides that *purchase orders or contracts* shall be signed by the purchasing agent and by the Comptroller. Purchase orders may be used in this class of transactions under the Statute.

The documents submitted to us do not reflect the bid, the conditions, if any, pertaining thereto, or the undertaking of the seller.

In the last paragraph of your letter, you inquire as to whether you are entitled to require more information about a proposed contract if you think it necessary to properly perform your duties. If the contract and surety bond has been executed by the seller, approved by the Purchasing Agent, and approved by the Corporation Counsel as to form and legality and you determine that there are sufficient funds in the account to be charged to pay the indebtedness created, you are not required to do more before signing the contracts.

We do not deem it proper for you to substitute your judgment for that of the Purchasing Agent in the determination as to the "lowest or highest responsible bidder as provided in Section 22A-3" of the statute. However, if you have information that would have a bearing on such a determination, you should feel free to impart it to the Purchasing Agent. The legislature has clothed the Purchasing Agent with considerable authority in awarding contracts and has placed an appropriate check on him by the Mayor, his superior, and an audit by the Comptroller. Prior to the Amendment of the Purchasing Act, the Comptroller approved contracts authorized by the City Council, when presented by the Purchasing Agent. The only additional duty of the Comptroller under the statute as amended is that he "shall conduct audits of all expenditures incident to all purchase orders and contracts awarded hereunder by the purchasing agent, and said Comptroller shall make reports on such audits to the Mayor and corporate authorities".

We return herewith the purchase orders referred to above.

WEST SIDE SUBWAY TRACK WORK

(No. 11986—Purchasing Agent—W. H. S.—December 9, 1955.)

At my request Mr. W. E. Rasmus, assistant chief engineer, and Mr. Dick Van Gorp, chief engineer, of the bureau of engineering of the department of public works, prepared a Memorandum in regard to the Agreement between City of Chicago and Chicago Transit Authority for track work, etc. in the West Side Subway extension (West Side Subway) from S. Laramie Avenue to a connection with the existing tracks in the Milwaukee-Dearborn-Congress Subway-(Route No. 2 of the Initial System of Subways, owned by the City of Chicago), which reads as follows:

"SUBJECT: WEST SIDE SUBWAY

CONTRACT WS-7—TRACK

In discussions held in the latter part of 1954 between representatives of the Bureau of Engineering and representatives of C. T. A., Mr. S. D. Forsythe, General Superintendent of Engineering, stated to us that C. T. A. would be willing to furnish and install the track for the West Side Subway to be installed in the median of the Congress Street Expressway under arrangements similar to those under which C. T. A. had previously performed work for the City on a cost basis. Mr. Forsythe pointed out that C. T. A. had in its employ a trained and competent track crew available for the work.

Under date of October 6, 1954, Mr. Van Gorp addressed a letter to the following:

Mr. J. P. Tuthill,
District Engineer,
State of Illinois,
Division of Highways.

Mr. Hugo J. Stark,
Chief Engineer,
Department of Highways,
County of Cook.

Mr. Roger F. Nusbaum,
Expressway Engineer,
State Division of Highways.

Mr. S. D. Forsythe,
Superintendent of Engineering,
Chicago Transit Authority.

This letter requested their attendance at a meeting on October 15, 1954, for the purpose of discussing the co-ordination of track and pavement construction in connection with the West Side Subway and the Congress Street Expressway. The meeting was held on October 15, 1954, with representatives of the Illinois Division of Highways, the Cook County Highway Department, Chicago Transit Authority and the Bureau of Engineering in attendance. At this meeting, Mr. Van Gorp advised the State and County representatives that the City and C. T. A. plan to enter into an agreement for the performance of the trackwork by C. T. A. Also the matter of cooperation between the various governmental agencies involved and their contractors was thoroughly discussed. The proceedings of the meeting are recorded in a memorandum prepared by Mr. E. L. Reiter of the Bureau of Engineering, dated October 15, 1954.

Under date of February 25, 1955, Mr. Forsythe formalized his offer in a letter addressed to Mr. Dick Van Gorp. Attached to his letter was an estimate of the cost of performing the work. That estimate was subsequently superseded by a revised estimate by Mr. Forsythe to Mr. Van Gorp under date of March 22, 1955.

Mr. Forsythe's letter of February 25, 1955, and the revised estimate of March 22, 1955, formed the basis of a letter form of agreement dated March 1, 1955, addressed to Mr. Virgil E. Gunlock, Chairman of the Chicago Transit Board, by Mr. George DeMent, Commissioner of Public Works.

Under date of March 9, 1955, copies of the aforementioned agreement, together with a draft of a council order were transmitted to the Committee on Finance of the City Council with a recommendation that the Committee recommend to the City Council that it authorize and direct the Commissioner of Public Works to enter into the agreement on behalf of the City.

Under date of April 14, 1955, Mr. DeMent addressed a letter to the Committee on Finance transmitting a draft of a revised council order changing the wording so as to authorize the Purchasing Agent in lieu of the Commissioner of Public Works to act on behalf of the City. The substitute order was passed by the City Council and appears in the Council Journal of April 21, 1955 at page 89.

On April 28, 1955, representatives of C. T. A. met with Mr. Van Gorp and members of his staff to agree upon an overall track design and to set up procedures for the quality control of the work by the Bureau of Engineering. It was agreed that C. T. A. would submit in writing for approval by the Bureau of Engineering detailed descriptions and prices of all materials to be bought by C. T. A. in connection with the trackwork. Under the procedures set up, and since followed, the Superintendent of Purchasing of

C. T. A. formally advertises for and received sealed bids which are publicly opened by C. T. A. at its main office. Recommendations are then made to Chicago Transit Board for authority to purchase. In each case, C. T. A. submits to the Bureau of Engineering a copy of the recommendation to Chicago Transit Board, listing the firms to which inquiries were sent, the names of the bidders and the amounts of the bids, and their recommendation of award.

Under date of July 27, 1955, the installation of the track in the median of the Congress Street Expressway started and continued until September 7, 1955, when C. T. A. was compelled to stop work because of interference by the paving contractors. On October 19, 1955, the trackwork was resumed by C. T. A.

Frequent visits by engineers of the Bureau of Engineering are made to the site to see that the work is performed efficiently and in accordance with the agreement and the specifications.

The arrangement between the City and C. T. A. for the furnishing and installation of this trackwork is similar to arrangements previously entered into between the City and C. T. A. for such jobs as the trackwork in Van Buren Street between Sacramento and Racine for the operation of Garfield Park trains, the trackwork and signal and interlocking work in connection with the Douglas Park connection at Lake Street, the trackwork and signal work in connection with the Wells Street Connection, and other work performed by C. T. A. in connection with the construction of the State Street and Dearborn Street Subways.

The advantages of having C. T. A. perform the trackwork in the Congress Street Expressway are substantial:

First, there is a saving in time of completion of the West Side Subway of approximately a year. C. T. A. was willing to proceed at once with the installation of track and to coordinate their work with the work of the paving contractors. If the work were to have been done by private contractors, it would have been necessary to defer commencement of the trackwork until the pavements had been substantially completed. It is highly desirable that the installation of the track go along simultaneously with the construction of the pavements because it would be impossible to use the roadways for vehicular traffic during the period of installation of the track;

Second, in our opinion the City will obtain this trackwork at less cost than it could obtain it from a private contractor for the simple reason that C. T. A. agrees to do the work at cost, that is to say, without profit;

Third, inasmuch as C. T. A. in addition to installing the track, performs the necessary engineering, including the preparation of plans and specifications, the Bureau of Engineering manpower may devote its time to other urgent work; and

Fourth, C. T. A. has every inducement to furnish a first class track at a minimum of cost because under the terms of the agreement, it will reimburse the City for every penny spent by the City for the work.

Copies of the letters and documents referred to in this memorandum are attached hereto.

Copies of the letters, etc., referred to in the above memorandum are set out in Appendix A hereto attached and made a part hereof, marked 1 to 10, inclusive.

The letter dated November 15, 1950 from Mr. Gunlock to Mr. Budd, No. 8 above, is set out in the order passed by the City Council on December 1, 1950 (C. J. 7181, 7182) which authorized and directed the commissioner of subways and superhighways to enter into the agreement with Chicago Transit Authority. A copy of the order is set out in Appendix A marked 12.

The letter dated December 2, 1952 from Mr. Van Gorp, deputy for the commissioner of subways and superhighways to Mr. Budd, No. 9 above, is set out in the order passed by the City Council on December 30, 1952 (C. J. 3902, 3903) which authorized and directed the commissioner of subways and superhighways to enter into the agreement with Chicago Transit Authority. A copy of the order is set out in Appendix A marked 13.

The letter dated April 22, 1954 from Mr. Gunlock to Mr. Budd, No. 10 above, is referred to in the order passed by the City Council on May 19, 1954 (C. J. 7581, 7582) which authorized and directed the commissioner of public works to enter into the agreement with Chicago Transit Authority. The letter is printed in the council journal of May 11, 1954 at page 7488. A copy of the order is set out in Appendix A marked 14.

Under date of April 8, 1955 Alderman P. J. Cullerton, chairman of the Committee on Finance of the City Council, addressed a letter to you reading as follows:

"On March 16, 1955, Council Journal Page 9695-6, the Committee on Finance recommended passage of an Order authorizing an Agreement with the C. T. A. for track work in median of the West Route of the Comprehensive Superhighway System at a total cost of not to exceed \$2,463,000.00 for track work and \$150,000.00 for engineering services and supervision.

This matter will be called up with recommendation for approval at the next regular business meeting of the City Council.

Pending confirming Council action, you may consider this letter your authority to proceed with the execution of Agreement as recommended by you.

Very truly yours,

/s/ P. J. CULLERTON

CHR :mn

cc to: Commissioner of Public Works
City Comptroller"

On April 21, 1955 (C. J. pages 89 and 90) the City Council passed the following Order:

"*Ordered*, That the Purchasing Agent be and he hereby is authorized and directed to enter into an agreement on behalf of the City of Chicago with Chicago Transit Authority, substantially in the form hereto attached, made a part hereof and marked 'Exhibit A' (letter dated March 1, 1955 addressed to Mr. Virgil E. Gunlock, Chairman, Chicago Transit Board, by Mr. George DeMent, Commissioner of Public Works, on file in the office of the Purchasing Agent) under which Chicago Transit Authority agrees to furnish all labor and material and to install the tracks, including crossovers, yard leads, turnouts and track relocations, tracks connecting its Douglas Park Branch with its Garfield Park Branch, tracks, platforms and ballast, in the West Route of the Comprehensive Superhighway System of the City of Chicago from a point near S. Laramie Avenue to a connection with the tracks now in the West Side Subway at a point near the east bank of the South Branch of the Chicago River, and the City of Chicago agrees to pay to Chicago Transit Authority for the cost of said work including the cost of labor, material and supervision the total sum of not to exceed \$2,463,000.00; and under which Chicago Transit Authority agrees to furnish all engineering services for the preparation of plans and the supervision of construction and field work for the aforementioned track work and all engineering services for the preparation of plans and specifications for the work of furnishing and installing the power-distribution system, the communication system and the power-super-

visory system, and the City of Chicago agrees to pay to Chicago Transit Authority for the cost of said work in an amount not to exceed the sum of \$150,000.00; and further provides that all costs of engineering labor, material and supervision, except that pertaining to ballast, shall be paid from Subway Bonds of 1952 and that under the terms of an ordinance authorizing and granting to Chicago Transit Authority the exclusive right to acquire, construct, reconstruct, maintain and operate facilities for local transportation within the City of Chicago, Chicago Transit Authority will reimburse the City for the cost of fixed transportation equipment to be installed in the West Side Subway including the cost of engineering; the cost of labor, material and supervision for ballast shall be paid from either Motor Fuel Tax Funds or Superhighway Bonds Funds; and the City Comptroller and City Treasurer are authorized and directed to pay bills submitted therefor when approved by the Purchasing Agent."

Exhibit A referred to in the above order is printed in full at page 90 of the council journal with the acceptance by the Chicago Transit Board on March 8, 1955. Exhibit A is Mr. DeMent's letter dated March 1, 1955 to Mr. Virgil E. Gunlock, Chairman of Chicago Transit Board and bears the "acceptance" by the Chicago Transit Board by V. E. Gunlock, chairman, dated March 8, 1955.

Under date of August 18, 1955 you addressed a letter to Mr. Melaniphy, acting corporation counsel, which reads:

"I have been asked to approve payment on a contract agreement between the City of Chicago, Department of Public Works, and the Chicago Transit Authority, for work under a \$2,613,000.00 contract which was approved by the City Council on April 21, 1955, Journal Page 89.

In reading over the Council Order it states that the Purchasing Agent be and is hereby authorized and directed to enter into an agreement in behalf of the City of Chicago and the Chicago Transit Authority, etc. I have not signed any document or agreement authorizing this contract. I am still in doubt as to whether or not the contract is legal.

I would appreciate your reviewing this agreement to determine the following:

1. Is this a legal contract?
2. Should the Purchasing Agent sign such agreement?
3. What responsibility does the Purchasing Agent assume in regard to:
 - (a) Performance.
 - (b) Quality Control.
4. Is the contract a binding agreement with merely the signatures of the Chairman of the CTA and the Commissioner of Public Works, and if so, are such signatures sufficient?

We do not have the original documents that were signed. We do not know the language of the agreement. We understand, however, a copy of the agreement is in the hands of the Comptroller and the Department of Public Works, neither of which contain the signature of the Purchasing Agent."

Mr. Melaniphy received your letter on August 24, 1955 and referred it to me for reply. As you know I have handled in this office for many years traction, subway and superhighway matters. I received your letter on August 29, 1955 and immediately telephoned Mr. Van Gorp. He told me that C. T. A. had started laying the track for the West Side Subway in the median strip of the west route superhighway on July 27, 1955 and was so engaged at the

time. Because of circumstances beyond my control of which you were informed I was unable to work on the matter. I learned in a telephone conference with Mr. Rasmus that he had conferred with you on August 24, 1955 and I asked him to send me a memorandum on the conference.

On September 1, 1955 I received from Mr. Rasmus a copy of his Memorandum dated August 30, 1955, a copy of which was sent to you. The Memorandum reads:

"CONTRACT WITH CHICAGO TRANSIT AUTHORITY FOR RAILS FOR
WEST SIDE SUBWAY EXTENSION.

The following records a conference between the Purchasing Agent, Mr. John F. Ward and the writer on Wednesday, August 24, 1955, in regard to the above-captioned subject.

Mr. Ward pointed out that although the language of the Council Order (C. J., p. 89, April 21, 1955) reads, 'That the Purchasing Agent be and he hereby is authorized and directed to enter into an agreement * * *', said agreement was actually entered into by the Commissioner of Public Works, Mr. George DeMent, in a letter dated March 1, 1955, addressed to Mr. Virgil E. Gunlock, Chairman of Chicago Transit Board. This was an inadvertence and the agreement should have been signed by the Purchasing Agent to comply with the language of the Council Order. However, it was pointed out that the Council Order did state that the aforementioned letter, dated March 1, 1955, and signed by the Commissioner of Public Works was made a part of the order and marked 'Exhibit A'.

Mr. Ward expressed some concern over the magnitude of the contract (\$2,463,000.00) and the meager contract terms and specifications. However, the writer pointed out that all of this work will ultimately be paid for by the Chicago Transit Authority and there was therefore every inducement for the C. T. A. to produce a first class track at the lowest possible cost. The writer also pointed out to Mr. Ward the several great advantages to the City of Chicago that will result from having C. T. A. furnish and build the track rather than having the work done under private contract. C. T. A. is excellently equipped with engineering staff and construction forces to design and build the track in a workmanlike manner at a minimum cost. C. T. A. will of course charge no profit to the City inasmuch as they are to ultimately pay for the track in monthly installments in the same fashion in which they are now paying for track and other fixed transportation equipment in the State Street and Dearborn Street subways. Also C. T. A. is willing to build this track piecemeal starting immediately and building and installing track wherever the paving contractors presently engaged in constructing the roadway pavements will permit them to proceed. If the work had been let to private contractors, it would be necessary to defer entering into a track contract until at least some of the paving contracts were completely furnished. Also C. T. A. is furnishing the engineering for the preparation of plans and specifications for the trackwork which is of great advantage to the Bureau of Engineering which is presently seriously understaffed for the very large public works program under way in its design office.

The writer further pointed out to Mr. Ward that the Bureau of Engineering was exercising careful quality control over the work which might be considered on behalf of the Purchasing Agent. Under the procedures set up between C. T. A. and the Bureau of Engineering, C. T. A. submits the specifications and the quotations for all material to be purchased for the work to the Bureau for approval before purchases are made. In each case, C. T. A. secures not less than three quotations. Also the Bureau furnishes engineering supervision for the work in the field.

Mr. Ward indicated that under the circumstances he would go along with the arrangements made between C. T. A. and the Department of Public Works, and that he plans to formalize the matter by submitting to C. T. A. a letter signed by himself and by such other City officials as may be necessary giving his approval to the agreement as it now stands."

You correctly stated in your letter of August 18, 1955 that "a copy of the agreement is in the hands of the Comptroller and the Department of Public Works, neither of which contains the signature of the Purchasing Agent".

In his memorandum Mr. Rasmus states that this "was an inadvertence and the agreement should have been signed by the Purchasing Agent to comply with the language of the Council Order". This was particularly unfortunate as with his letter of April 14, 1955 to the committee on finance the Commissioner of Public Works had transmitted a *revised* draft order which he asked to have substituted for the draft transmitted with his letter of March 9, 1955. The revised draft order which was passed by the City Council on April 21, 1955, authorized and directed the Purchasing Agent instead of the Commissioner of Public Works to enter into the agreement on behalf of the City and also required the approval of the Purchasing Agent rather than the Commissioner of Public Works for payment for work performed under the agreement.

Your letter requests a review of the agreement to determine four questions which I state in answering them. The questions are as follows:

"1. *Is this a legal contract?*

2. *Should the Purchasing Agent sign such agreement?"*

In my opinion it is a legal contract and the Purchasing Agent should sign it and obtain the approval of the Mayor and City Comptroller thereon which I understand is your procedure.

"4. *Is the contract a binding agreement with merely the signatures of the Chairman of the C. T. A. and the Commissioner of Public Works, and if so are such signatures sufficient?"*

For the purposes of this opinion the question is an academic one because of the fact that the City Council, at the request of the commissioner of public works, authorized and directed the Purchasing Agent instead of the Commissioner

"to enter into an agreement on behalf of the City of Chicago with Chicago Transit Authority, substantially in the form hereto attached, made a part hereof and marked 'Exhibit A' (letter dated March 1, 1955 addressed to Mr. Virgil E. Gunlock, Chairman, Chicago Transit Board, by Mr. George DeMent, Commissioner of Public Works, on file in the office of the Purchasing Agent) * * *."

As you have asked the question, however, I will answer it. In my opinion it would have been a binding and valid agreement if the Purchasing Agent had not been substituted for the Commissioner of Public Works. His letter of March 1, 1955 to the chairman of Chicago Transit Board constitutes the agreement but it would have had no legal vitality until the City Council had passed an ordinance or order authorizing its execution on behalf of the City just as the Chicago Transit Board had authorized its execution on behalf of Chicago Transit Authority and just as the City Council did on April 21, 1955 when it passed the order authorizing you to sign it on behalf of the City of Chicago.

The aldermen of the city are the "*corporate authorities*" of the municipality who are vested with authority in regard to matters of the character here being considered (See section 19-2 of chapter 24, C. & V. Act, Ill. Rev. Stat. 1955, page 541).

It should be recalled that similar agreements with C. T. A. were by orders passed by the City Council, copies of which are attached hereto in Appendix A marked 8, 9 and 10, and the work was done and the cost thereof was paid.

"3. *What responsibility does the Purchasing Agent assume in regard to:*

(a) *Performance?"*

In my opinion you have no responsibility in the matter of *performance of the track work.*

On December 30, 1946 the City Council passed the ordinance for the construction of the West Side Extension of the Initial System of Subways to be known as "West Side Subway" (C. J. pages 6817 to 6819, both inclusive).

Section 4 of said ordinance is as follows:

"Said subway shall be built in accordance with approved engineering practice and shall be constructed in accordance with the general plans and drawings therefor, dated September 19, 1946 and signed by the Commissioner of Subways and Superhighways, a copy of which general plans and drawings is attached hereto and made a part of this ordinance.

Detailed plans and specifications covering the design and construction of said subway shall be prepared by the Commissioner of Subways and Superhighways of the city of Chicago. The detailed plans and specifications shall conform with said general plans and drawings above referred to. *It shall be the duty of the Commissioner of Subways and Superhighways of the city of Chicago to supervise and control the construction and maintenance of said subway.*" (Emphasis ours.)

11. A copy of said ordinance is set out in Appendix A and marked number

The powers and duties of the Commissioner of Subways and Superhighways are now in the Commissioner of Public Works. By the ordinances passed by the City Council on November 10, 1952 the department of subways and superhighways was abolished and it was consolidated with the department of public works (C. J. pages 3410-3412).

Section 4 of the ordinance of November 10, 1952 (C. J. 3411) reads in part as follows:

"Section 4. Chapter 8 of the said Code is amended by the addition of a new Section 8-16.1, said additional section to read as follows:

8-16.1. The commissioner of public works shall cooperate with the city council and the committee on local transportation of the city council in all matters pertaining to local transportation and with the city council and its committees, the Chicago Plan Commission and the Board of Commissioners of Cook County and its committees and officers in all matters *pertaining to the location of superhighways and the preparation of plans and specifications therefor. He shall prepare and submit to the city council for its consideration plans, estimates of costs, and recommendations for the construction by the city of subways for local transportation purposes as authorized by said above named act approved June 19, 1929, in, under and along the public ways, public places and other lands and property, both public and private, the Chicago river and its branches, and the canals under the jurisdiction of the Sanitary District of Chicago, for the operation therein, if and when authorized by an ordinance passed by the city council and approved by the electors of the city, of public utility local transportation*

vehicles, including (without prejudice to the generality of the foregoing description) street cars, elevated railway cars and trains and motor and trolley coaches." (Emphasis ours.)

Section 6 of the ordinance is as follows:

"Section 6. Section 8-22 of said Code is amended to read as follows:

8-22. There is hereby established a bureau of engineering which shall be under the jurisdiction and control of the commissioner of public works. *Said bureau shall have control of the planning, design and construction of all capital works undertaken by the City of Chicago.* Said bureau shall embrace such engineers, inspectors, clerks, accountants and other employees as the City Council may provide by annual appropriation ordinance." (Emphasis supplied.)

On January 26, 1953 the city council passed an ordinance section 1 of which is as follows:

"Section 1. In all cases where contracts, agreements or other documents heretofore entered into by the City of Chicago or by the commissioner of subways and superhighways on behalf of the City of Chicago contain provisions relative to the taking of any action or the performing of any condition thereunder by the commissioner of subways and superhighways, such action shall be taken or such performance shall be undertaken by the commissioner of public works" (C. J. page 4177).

"3. *What responsibility does the Purchasing Agent assume in regard to:*

* * * * *

(b) Quality Control?"

My answer to question 3(a) also applies to this question 3(b). So that you may be fully informed on the matter which I consider to be of prime importance to the city I asked the bureau of engineering for a statement in regard to this aspect of the matter.

In reply I received a letter dated October 24, 1955 from Mr. Van Gorp, chief engineer, which reads as follows:

"Re: West Side Subway Extension
Section WS-7-Track (CTA)

Transmitted herewith are photostats of the exchange of correspondence between the Purchasing Agent of the C. T. A. and the Chief Engineer of the Bureau of Engineering in regard to the purchase of material and equipment for the above-captioned project.

This transmittal is in response to your recent request."

Attached thereto are the photostats referred to in the above letter of transmittal, numbered 1 to 93, both inclusive. They are in Appendix B hereto attached.

In Appendix C hereto attached is a pamphlet issued by the city clerk which contains

- (1) a copy of the ordinance passed by the City Council on April 23, 1945 authorizing and granting to Chicago Transit Authority the exclusive right to acquire, construct, reconstruct, maintain and operate facilities for local transportation within the city of Chicago.
- and (2) a copy of the Metropolitan Transit Authority Act and copies of its companion acts, all approved on April 12, 1945.

Sections 32 and 33 of the Metropolitan Transit Authority Act read as follows:

"Section 32. All contracts for the sale of property of the value of more than \$2,500 or for any concession in or lease of property of the Authority for a term of more than one year shall be awarded to the highest responsible bidder, after advertising for bids. All construction contracts and contracts for supplies, materials, equipment and services, when the expense thereof will exceed \$2,500 shall be let to the lowest responsible bidder, after advertising for bids, excepting (1) when by vote of at least five members of the Board it is determined that an emergency requires immediate delivery of supplies, materials or equipment or performance of services; (2) when repair parts, accessories, equipment or services are required for equipment or services previously furnished or contracted for; (3) when the nature of the services required is such that competitive bidding is not in the best interest of the public, including, without limiting the generality of the foregoing, the services of accountants, architects, attorneys, engineers, physicians, superintendents of construction, and others possessing a high degree of skill; (4) when services such as water, light, heat, power, telephone or telegraph are required.

All contracts involving less than \$2,500 shall be let by competitive bidding whenever possible, and in any event in a manner calculated to insure the best interests of the public.

In determining the responsibility of any bidder, the Board may take into account past record of dealings with the bidder, experience, adequacy of equipment, ability to complete performance within the time set, and other factors besides financial responsibility, but in no case shall any such contract be awarded to any other than the highest bidder (in case of sale, concession or lease) or the lowest bidder (in case of purchase or expenditure) unless authorized or approved by a vote of at least five members of the Board, and unless such action is accompanied by a statement in writing setting forth the reasons for not awarding the contract to the highest or lowest bidder, as the case may be, which statement shall be kept on file in the principal office of the Authority and open to public inspection.

From the group of responsible bidders the lowest bidder shall be selected in the following manner: to all bids for sales the gross receipts of which are not taxable under the 'Retailers' Occupation Tax Act' approved June 28, 1933, as amended, there shall be added an amount equal to the tax which would be payable under said Act, if applicable, and the lowest in amount of said adjusted bids and bids for sales the gross receipts of which are taxable under said Act shall be considered the lowest bid; provided, that, if said lowest bid relates to a sale not taxable under said Act, any contract entered into thereon shall be in the amount of the original bid not adjusted as aforesaid.

Contracts shall not be split into parts involving expenditure of less than \$2,500 for the purpose of avoiding the provisions of this Section, and all such split contracts shall be void. If any collusion occurs among bidders or prospective bidders in restraint of freedom of competition, by agreement to bid a fixed amount or to refrain from bidding, or otherwise, the bids of such bidders shall be void. Each bidder shall accompany his bid with a sworn statement that he has not been a party to any such agreement.

Members of the Board, officers and employees of the Authority, and their relatives within the fourth degree by the terms of the civil law, are forbidden to be interested directly or indirectly in any contract for construction or maintenance work or for the delivery of materials, supplies or equipment.

The Board shall have the right to reject all bids and to readvertise for bids. If after such readvertisement no responsible and satisfactory bid, within the terms of the advertisement, shall be received, the Board may award such contract without competitive bidding, provided that it shall not be less advantageous to the Authority than any valid bid received pursuant to advertisement.

The Board shall adopt rules and regulations to carry into effect the provisions of this section.

Section 33. *Advertisements for bids shall be published at least twice in a daily newspaper of general circulation published in the metropolitan area, the last publication to be at least ten calendar days before the time for receiving bids, and such advertisement shall also be posted on readily accessible bulletin boards in the principal office of the Authority.* Such advertisements shall state the time and place for receiving and opening of bids, and by reference to plans and specifications on file at the time of the first publication, or in the advertisement itself, shall describe the character of the proposed contract in sufficient detail to fully advise prospective bidders of their obligations and to insure free and open competitive bidding.

All bids in response to advertisements shall be sealed and shall be publicly opened by the Board, and all bidders shall be entitled to be present in person or by representatives. Cash or a certified or satisfactory cashier's check, as a deposit of good faith, in a reasonable amount to be fixed by the Board before advertising for bids, shall be required with the proposal of each bidder. Bond for faithful performance of the contract with surety or sureties satisfactory to the Board and adequate insurance may be required in reasonable amounts to be fixed by the Board before advertising for bids.

The contract shall be awarded as promptly as possible after the opening of bids. The bid of the successful bidder, as well as the bids of the unsuccessful bidders, shall be placed on file and be open to public inspection. All bids shall be void if any disclosure of the terms of any bid in response to an advertisement is made or permitted to be made by the Board before the time fixed for opening bids.

Any bidder who has submitted a bid in compliance with the requirements for bidding may bring suit in equity in any court of competent jurisdiction in Cook County to compel compliance with the provisions of this Act relating to the awarding of contracts by the Board." (Emphasis supplied.)

In the first part of the above pamphlet is the copy of the ordinance of April 23, 1945, approved by the Mayor on April 30, 1945, and approved by the electors of the city at a referendum election held June 4, 1945 (See Appendix C hereto).

Reference is now made to the provisions of paragraph E of section 9 of the ordinance passed April 23, 1945 which pertain to track work and the reimbursement of the City by C. T. A. for the cost thereof. Beginning at the bottom of the right hand column of page 10 of the pamphlet and continuing on page 11 the provisions are as follows:

"The City shall be reimbursed for the initial cost of furnishing and installing transportation equipment in such subways, which shall include the cost of track, signals and interlocking equipment, traction power distribution system, electrical distribution system for service to facilities for direction, destination, display and concession purposes, duct lines and emergency walkways, communication and emergency alarm systems, in the following manner:

Beginning with the date upon which the Grantee shall assume its obligations with respect to maintenance or operation of any City-owned

subway or extension thereof as herein provided, the Grantee shall make adequate provision for and shall pay through monthly payments to the City Comptroller, amounts adequate to reimburse the City for the depreciated cost of each and every item of such subway transportation equipment so furnished and installed by the City during its useful life and shall make adequate provisions for and shall maintain and replace at the Grantee's own cost and expense, each and every item of such subway transportation equipment whenever such replacement becomes necessary because of operation or use by the Grantee. *Amounts sufficient to amortize the initial depreciated cost of said transportation equipment, to be paid monthly by the Grantee to the City under the provisions of this paragraph shall be determined by agreement between the Grantee and the commissioner of subways and superhighways and all payments so made to the City shall be deposited by the Comptroller in the City Transit Fund.*

The Grantee, as promptly as practicable after the receipt of reasonable notice from the commissioner of subways and superhighways, shall begin the performance of its obligations provided for in this paragraph E of section 9, and shall, during the performance of such obligations, operate the drainage and ventilating systems and protect such portions of the subways, extensions and incline connections or other structures appertaining thereto, in which it shall from time to time be performing such obligations, and before operation shall remove all temporary protections whether installed by it or by the City.

All expenditures made under this ordinance by the Grantee and by the City in the performance of work provided for in this paragraph E shall be considered as having been made pursuant to the terms of this ordinance in any accounting between the Grantee and the City and in the adjustment of the property accounts of the Grantee." (Emphasis supplied.)

Immediately following the above quoted provisions the paragraph pertaining to whether the City or C. T. A. or both jointly do the work provided for in said paragraph E of section 9 the following provision appears in the left hand column of page 11 of the pamphlet:

"In those instances where the obligations of the Grantee and the obligations of the City as provided in this paragraph E, must of necessity or can be more expeditiously or economically performed either by the Grantee or by the City or jointly by the Grantee and the City, then such obligations shall be so performed, and complete accounts shall be kept and the actual cost of labor, material, equipment and immediate supervision so furnished or performed (with no percentage or overhead added for the City or for the Grantee) shall be allocated to and paid by the Grantee to the City or by the City to the Grantee as the case may be, such allocation and payment to be made in accordance with the provisions of this paragraph E." (Emphasis supplied.)

On May 3, 1950 two ordinances were passed by the City Council entitled:

"Ordinance authorizing execution of an agreement determining amount of monthly payments to be made by Chicago Transit Authority to the City of Chicago for reimbursement of initial cost of transportation equipment in Dearborn Street Subway" (Council Journal, pages 6171, 6172)

and

"Ordinance authorizing execution of an agreement determining amount of monthly payments to be made by Chicago Transit Authority to the City of Chicago for reimbursement of initial depreciated cost of transportation equipment in State Street Subway" (Council Journal, pages 6172- 6174).

A photostatic copy of each of the two ordinances and of the agreements which were dated May 3, 1950 and fully executed as provided by the ordinance on behalf of the City of Chicago and by Chicago Transit Authority is in Appendix C hereto.

Attached hereto, in Appendix D, is a pamphlet issued in 1938 by the department of subways and traction. It contains copies of the following:

- (1) Ordinance passed by the City Council on November 3, 1938 (C. J. 7215 to 7218) for the construction of the Initial System of Subways for local transportation purposes to be and remain the property of the city (Route 1—State Street Subway and Route 2—Dearborn Street Subway);
- (2) Ordinance passed by the City Council on November 3, 1938 (C. J. 7218, 7219), creating the department of subways and traction and the office of commissioner of subways and traction and also specifying his powers and authority;
- (3) The Grant Agreement (Docket No. Ill. 1891 F), dated as of October 25, 1938, between the United States of America and the City of Chicago, accepted by the ordinance passed by the City Council on October 28, 1938 (C. J. 7156-7166) and amended by the ordinance passed November 3, 1938 accepting and authorizing certain changes in the proposed Grant Agreement (C. J. 7213-7215); and
- (4) The Deposit Agreement, dated December 2, 1938, between the City of Chicago and the Continental Illinois National Bank and Trust Company of Chicago, for the deposit of city funds and all payments by the United States on account of said grant to aid in financing the construction by the City of Chicago of an Initial System of Subways for local transportation purposes, approved and accepted by the ordinance passed on November 30, 1938 (C. J. 7275-7279).

The above Grant Agreement dated as of October 25, 1938 was for the sum of not to exceed \$18,000,000.00.

On November 26, 1940 the city council passed the ordinance accepting the Amendatory Grant Agreement dated as of November 20, 1940 which increased the amount from \$18,000,000. to \$23,130,000. (C. J. 3550-3554).

On June 18, 1946 the city council passed the ordinance accepting the Second Amendatory Grant Agreement dated as of May 15, 1946 which increased the amount from \$23,130,000. to \$25,200,000. (C. J. 5876-5881).

On April 17, 1947 the city council passed the ordinance accepting the Third Amendatory Grant Agreement dated as of April 1, 1947 which increased the amount from \$25,200,000. to \$25,967,000. (C. J. 22, 23).

On December 29, 1948 the city council passed the ordinance accepting the Fourth Amendatory Grant Agreement dated as of December 13, 1948 which amended section 1 of part 1 of the Grant Agreement dated as of October 25, 1938, as amended, by eliminating the turnback loop in W. Congress Street at the east bank of the river and by establishing the terminus of the subway in W. Congress Street near the west bank of the river and also adding at the end of subsection (b) of section 2 of said part 1 the following:

“and provided, further, that the Government will make a grant payment to the City in the amount of \$3,100,000. pursuant to, and as requested by the City, in its Fourteenth Intermediate Grant Requisition, dated November 15, 1948” (C. J. 3529-3531).

The provision last quoted was not an increase in the amount of the grant but provided for the payment to the City by the United States of America

of \$3,100,000 of the balance of the Subway Grant. (See Mayor's letter to Committee on Finance—C. J. p. 3529.)

For convenience I quote from the Grant Agreement dated as of October 25, 1938 portions of section 9 of part 1 entitled "*Special Conditions to Government's Obligations Hereunder*" the following sub-sections which read as follows: (at pages 18 to 21, inclusive)

"9. Special Conditions to Government's Obligations Hereunder. The Government shall be under no obligation to make any Grant hereunder

* * * * *

(f) Unless the Applicant shall, not later than July 1, 1939, or such later date as the Administrator may approve, have submitted to the Administrator for his approval a proposed ordinance providing for the unification and unified operation of the local transportation systems in the City of Chicago, which proposed ordinance shall be in all respects satisfactory to the Administrator and shall include (among others) provisions

- (i) *For the equipping (including rolling stock) and operation (whether by lease or otherwise, as the Administrator may approve) of the subway as an integral part of the local transportation system;*
- (ii) *For the unified operation of all local transportation facilities, with universal transfer privileges and proper coordination of facilities to the end that unnecessary duplication can be eliminated and best use of all facilities fostered;*
- (iii) *For the construction of necessary physical connections between the subway system and other parts of the transportation system;*
- (iv) *For the payment to the City of a share of the gross revenues to be derived by the grantee or grantees under the proposed consolidated franchise, including revenues derived by the operators of any bus feeder lines operating in conjunction with the consolidated transportation system, the monies so paid to the City to be used for the sole purpose of extending the subway; Provided, however, That in the event that a comprehensive subway system shall have been constructed in accordance with the plan to be submitted to the Administrator pursuant to subsection (j) of this Section, and that Applicant, by appropriate action of its duly authorized representatives, or such other body as may have competent jurisdiction in the matter, shall have determined that further extension of the subway system is unnecessary and not desirable, such monies may be used for the rehabilitation, extension or improvement of any part of the transportation system; or*

* * * * *

(g) Unless the ordinance or ordinances referred to in subsection (f), in form satisfactory to the Administrator, shall have been adopted by the Applicant and duly approved at referendum on or before September 1, 1939, or such later date as the Administrator may approve; or

* * * * *

(j) Unless the Applicant shall, on or before July 1, 1939, or such later date as the Administrator may approve, have submitted to the Administrator *a comprehensive plan for the extension of the subway system, satisfactory to the Administrator and in such detail as he may require, to include provision for the widening of E. Congress Street and W. Congress Street from S. Michigan Avenue*

westward and for the construction of a subway in W. Congress Street, from S. Dearborn Street westward; and shall, in the event that the State of Illinois shall make available for such construction the proceeds of the motor fuel tax collected from users in the City of Chicago, or an adequate part thereof, or other monies adequate for said purpose, have proceeded promptly with such construction and carried on the same as rapidly as possible according to plans and specification approved by the PWA Commission.

It is expressly understood and agreed, however, that the requirements of the foregoing subsections (a) to (j), inclusive, constitute conditions limiting the obligations of the Government hereunder, and not covenants which the Applicant agrees to perform or comply with (except as and to the extent that it may have expressly agreed to perform or comply with the same, or any thereof, elsewhere in this Agreement), but in the event that the Applicant shall fail of timely performance of or compliance with any of said conditions, in whole or in part, the Government shall be under no obligation and may, by written notice from the Administrator to the Applicant, terminate this Agreement and all of its obligations hereunder." (Emphasis supplied by italics.)

Also in Appendix D is a copy of the 14th Annual Report of the department of subways and superhighways for the year ended December 31 1952. It is the final report of that department as the merger with the department of public works took effect January 1, 1953.

I call attention to the Subway Balance Sheet contained in the final report at pages 52 and 53.

It shows total assets at \$75,563,524.75, the second item being "*Fixed Transportation Equipment* (Note A) \$9,130,371.00" (p. 52).

Said Note "A" is as follows: (p. 53)

"This expenditure is in process of being *reimbursed to the City of Chicago by Chicago Transit Authority* under the terms of the Ordinance passed by the City Council on April 23, 1945 and accepted by Chicago Transit Authority on July 10, 1945. *To date the sum of \$1,249,807.36 has been paid to the City and has been deposited in the City of Chicago Transit Fund*" (p. 53). (Emphasis supplied.)

LIQUIDATED DAMAGES

(No. 12020—Commissioner of Public Works—J. P. D.—March 7, 1956.)

In your letter of February 24, 1956 you requested a formal ruling regarding the legality of a liquidated damage provision in City contracts in the event a time schedule is not met by the Contractor.

In order to provide for liquidated damages in a contract where time is of the essence, the damages which will result from a failure to perform the contract must be of such a nature that they cannot be definitely ascertained or proved, and the parties, being competent and free to contract, stipulate a reasonable sum of liquidated damages to be paid in case of a failure to perform the contract according to its terms.

The courts are strongly inclined to let the parties make their own contracts and carry out their own intentions but it is necessary that the parties

do more than use the words, "liquidated damages", they must show the necessity and reasonableness of such a provision in order that it be upheld.

Therefore if it would be difficult to ascertain actual damages that might arise for failure to perform the contract according to its terms, the parties may agree to a reasonable amount as liquidated damages and the court will in our opinion sustain the same.

CANCELLATION BY MUTUAL CONSENT

(No. 12031—Purchasing Agent—J. C. M.—April 19, 1956.)

I wish to acknowledge receipt of your letter of April 18, 1956 which, in part, reads as follows:

"Your opinion is requested as to whether a contract with Library Efficiency Corporation Division of Bro-Dart Industries, for Library Furniture, can be terminated by mutual consent. The following are the facts surrounding this case:

"The specifications provide for quality defined as 'Remington Rand or equal'. The contractor was awarded the contract inasmuch as he was the low bidder and they delivered furniture which, according to our inspector's report, was not equal to the quality as manufactured by Remington Rand. The contractor has requested first, a preference for termination by mutual consent provided it does not place them in jeopardy and only secondly, to rebuild the furniture to meet the Purchasing Department's and Chicago Public Library's approval."

From an examination of the files it appears (1) that the City of Chicago considers the furniture delivered not to be in accordance with the specifications; (2) that the manufacturer considers that the furniture is "equal to" or "superior" in some respects to "Remington Rand" equipment and that the City is taking the position that the equipment should be "identical and not equal to" and that such position is untenable; that rather than have any controversy with the City, the manufacturer is willing that the contract be cancelled by mutual agreement and that the equipment be taken back by it. Such latter action should be without liability to the City and without prejudice to the right of the manufacturer to transact business with the city in the future; (3) that there is an area of dispute as to the specifications wherein the parties, in good faith, may reach different conclusions as to what was intended.

It appears from the file that for the contractor to rebuild the furniture in an effort to satisfy the City, it may incur costs far beyond the contract price and at the same time never be able to satisfy the specifications.

We are of the opinion that you may agree with the contractor to cancel the contract, without liability on the part of either and without prejudicing the rights of the Library Efficiency Corporation Division of Bro-Dart Industries to transact further business with the City of Chicago due to this unfortunate experience and permit it to take possession of the furniture and equipment.

OPTION TO INCREASE QUANTITY OF WORK

(No. 12098—*Purchasing Agent—J. C. M.—December 20, 1956.*)

In your letter of November 30, 1956 you inquire as to the legality of increasing the contract price of the above numbered contract by adding additional operations in installing street lighting facilities and restoring to the original contract work to the extent of \$750,000.00, which work had been eliminated after the contract was executed, as stated in Commissioner Johnson's letter dated November 19, 1956.

It appears from the files that a contract was awarded Kil-Bar Electric Co., Inc. and Meade Electric Co., Inc., to install street lighting facilities for the sum of \$10,463,842. This contract was reduced by the City by \$750,000 after it was executed, making the sum payable \$9,713,842. The Commissioner of Streets and Sanitation now desires to restore to the contract work to the extent of \$750,000 and extend the contract by adding additional operations of installation to the extent of \$2,000,000. The commissioner represents that by such increases in installation operations, at the original contract price, the City of Chicago will save a substantial sum of money.

On Page 6 of the General Conditions of the Contract there is the following provision:

"Whether or not a contract is awarded providing for all the work described herein, the City reserves the right to increase or decrease quantity of work to be done by this contractor. Increase of approximate quantities designated in the attached proposal shall be subject to acceptance of contractor. Decrease of approximate quantities designated in the attached proposal shall be determined by the City and any such reduction shall not constitute a claim for compensation by this Contractor. In case of increase or decrease of approximate quantities designated in the attached proposal, payment for actual work performed shall be made at unit prices bid by this Contractor."

The provision presents a legal question on mutuality of contract. It will be noted that the City reserves the right to increase or decrease the quantity of work to be done. Any increase in quantities is subject to the approval of the contractor. The City can decrease the quantity of work to be done under the contract without the consent of the contractor. It was under this provision that the City decreased the quantity of work to be done by the sum of \$750,000, subsequent to the execution of the contract. The Commissioner desires to restore this work and increase the quantity of work over and above that sum. We assume that the contractor will agree to the increase suggested.

In *Armstrong Paint & Varnish Works v. Continental Can Co.*, 301 Ill. 102, the Supreme Court laid down the law as follows:

"The can company contends that if this construction is placed on the contract it would be unenforceable on the ground that it lacks mutuality. While consideration is essential to the validity of a contract, mutuality of obligation is not. Where there is no other consideration for a contract the mutual promises of the parties constitute the consideration, and these promises must be binding on both parties or the contract falls for want of consideration, but where there is any other consideration for the contract mutuality of obligation is not essential. If mutuality, in a broad sense, were held to be an essential element in every valid contract to the extent that both contracting

parties could sue on it, there could be no such thing as a valid unilateral or option contract. Such contracts have long been recognized as valid contracts in Illinois, * * *."

It appears that the contract in question is an executory contract and not one fully performed. It further appears that work has been performed by the contractor. There is sufficient consideration to support the exercise of the option.

It further appears that the City exercised the right to increase the quantity of work under Contract 16457, which is similar to the one here involved, on June 16, 1953, by approximately 40%.

Assuming that there are sufficient funds on hand to cover the additional work requested, we are of the opinion that the City may exercise its option under the quoted provision of the contract. That provision was in the documents that were available to all bidders.

We express no opinion as to the extent to which the City should increase the quantities under the contract, other than to say that such increases should bear a reasonable relation to the total contract price. The exercise of the option should not be used to circumvent the provisions of the Purchasing Act. The exercise of options in favor of the City may be reasonable in one case and not in another. Each must be determined upon the attendant facts.

The request of the Commissioner appears to be just as to restoring to the contract the work amounting to \$750,000 and a reasonable increase in the amount of work provided for in the original contract may be considered legal and proper.

PERFORMANCE BOND NOT OPERATING COST

(No. 12120—Commissioner, Streets and Sanitation—J. G. O.—May 7, 1957.)

We have reviewed your letter of March 29, 1957, in which you state that various operators of City of Chicago Parking Facilities have taken exception to your refusal to reimburse them, as an operating expense, the premium on the performance bond, which each operator is required to furnish the City of Chicago.

We believe that the cost of the performance bond is not an operating expense, for it is our opinion that said premium expense is a condition precedent to the performance of the contract, rather than a cost of the operation proper.

UNIT PRICE BASIS OF PAYMENT

(No. 12146—City Comptroller—J. G. O.—July 23, 1957.)

In your recent letter concerning the above subject, you request our advice as to the practice you should follow in making payment under the following conditions:

1. When the City of Chicago enters into a construction contract with unit prices for various construction items, with a stated over-all estimated cost, is it required that the contract be amended by a

change order if the *total completion costs* exceeds the *total estimated cost*? If there are some conditions under which the amendment is necessary and others where it is not, what are these conditions?

2. When the City of Chicago enters into a construction contract with unit prices for various construction items, with or without a stated over-all estimated cost, is it required that the contract be amended by a change order when the quantity of work done or quantity of material delivered for *any item* exceeds the estimated quantities by more than ten per cent? Is the opinion the same where the actual quantities are more than twice the estimate? If a change order is necessary at all when the actual performance or delivery exceeds the estimated quantities, at what point is a change order required?

You also ask for our interpretation of a standard phrase in the city contracts, which reads as follows:

3. "It is expressly understood and agreed that no payment shall be made to said party of the first part for any *extra work* or material or of any greater amount of money than is herein *stipulated* to be paid, unless some changes in or additions to the contract requiring additional outlay by said party of the first part shall first have been expressly authorized and ordered in writing by said Purchasing Agent, and signed by *the Mayor and City Comptroller*."

It is our opinion that payment under construction contracts based on unit prices should be made on the basis of the unit price of each individual item set forth in the contractor's bid, whether there is, or is not, a total estimated cost.

A change order is necessary only when the estimated quantity of any unit item is increased or decreased more than 10%; since such a percentage change is a reasonable one and could not conceivably be considered a material alteration of the contract.

Therefore, the standard provision of the contract which is set forth in paragraph 3 would only apply when the estimated quantity of a unit item is increased more than 10%.

REFUSE REMOVAL

(No. 12238—Purchasing Agent—E. W. P.—July 8, 1958.)

We have before us the proposed removal contract No. 19743 covering the removal of decayed refuse fill from the City Dump at 103rd Street & Doty Avenue, Chicago, Illinois.

The contract by its terms would begin May 1, 1958 and terminate April 30, 1959 with a six months extension clause; however, we understand from Mr. Hubert L. Will, the Attorney for Nu-Soil, Inc., that the sole question presented is whether or not you can under the provisions of the Statute let a contract for a period of over one year for the removal and final disposition of decayed refuse.

In our opinion the substance which is the subject matter of the contract falls within the classification of garbage and ashes and under the provisions of Article 40, Section 1 of Chapter 24 of the Statutes you have the authority to let this contract.

This Article reads as follows:

"Section 40-1. Cities over 5,000 may make five year garbage and ashes disposal contracts.) Any City, Village or Incorporated Town has the power to make contracts for more than one year and not exceeding five years relating to the collection and final disposition of garbage and ashes. As amended by act approved June 13, 1957. L. 1957, p., S. B. No. 430."

The definition of garbage under 40-1a states that refuse means garbage. It is true under 40-2 where a contract is made the governing body shall include the amount therefor in its annual appropriation sufficient to pay the amount to become due and payable. However, the instant contract calls for payment on the part of Nu-Soil to the City of Chicago in addition to the obligation of the said contractor to furnish labor and equipment.

Under Articles 87-1 and 87-1.1 the provisions contained in Article 40-1 is considered as an alternative or additional power of the municipality, accumulative in effect and it is our opinion that you have the authority to execute the contract even if it is for a period for more than one year on behalf of the City of Chicago.

C. PURCHASING AGENT

CONVICT LABOR FOR BOOK BINDING

(No. 12113—Purchasing Agent—M. C. H.—March 28, 1957.)

This is to acknowledge receipt of your letter of March 19, 1957, in which an opinion is requested whether it is advisable to consider a proposal from the Illinois State Penitentiary to the Chicago Public Library to do the book binding work for the library, which book binding work is operated with convict labor.

Section 75 of Chap. 108, Ill. Rev. Stat. provides as follows:

"The Department of Public Safety shall attend to the disposition and distribution of all the products of the skill and labor of the convicts and prisoners. It shall particularly see that under no circumstances shall any of the products of such labor be sold upon the open markets, except as hereinafter provided and that such products do not enter into conflict with any of the established industries of the state, except as hereinafter provided. The Department shall at all times, inform itself, so far as possible, of the industrial conditions of the State of Illinois, and see that the labor of the convicts and prisoners does not enter into competition with the products of free labor, except as hereinafter provided. 1903, May 11, Laws 1903, p. 271, Sec. 3; 1905, May 18, Laws 1905, p. 345, Sec. 1; 1943, June 8, Laws 1943, vol. 1, p. 988, Sec. 1."

The exception to the provisions of Section 75, Chap. 108, Ill. Rev. Stat. may be found in Section 83 A of this Chapter, which provides as follows:

*** "Provided that nothing contained herein shall be construed to prevent the production of crushed limestone and lime dust in the penal and reformatory institutions of the State nor the sale to the public by

the Department of Public Safety of crushed limestone and lime dust for agricultural and horticultural purposes. 1903, May 11, Laws 1903, p. 271, Sec. 11 a, added 1931, June 29, Laws 1931, p. 727, Sec. 1; 1941, June 30, Laws 1941, vol. 1, p. 1011, Sec. 1."

The primary purpose of the provisions in this act prohibiting the Public Welfare Department from disposition of products manufactured by convicts in the open market was to avoid competition with free labor. The Welfare Department is charged with the duty of seeing that at no time shall any of the products of the labor of said convicts or prisoners reach the open market.

The offer by the Welfare Department to the Chicago Public Library to perform certain book binding work with prison labor is in our opinion not a legitimate exercise of the duty the Department of Public Welfare is charged with.

In view of the foregoing, we are of the opinion that it is inadvisable to consider the proposal made to you having book binding done with prison labor.

PURCHASING ACT INAPPLICABLE TO MUNICIPAL COURT

(No. 12117—City Comptroller—J. C. M.—April 16, 1957.)

In your letter of April 5, 1957 you attached a copy of a letter addressed to you by Honorable Raymond P. Drymalski, Chief Justice of the Municipal Court. With his letter, the Chief Justice attached certain bills for court reporting incurred by the court in order to comply with Rule 65-1 of the Supreme Court Rules. Because the rate charged by the court reporter is bigger than the rate charged the City of Chicago, through contracts negotiated with the Purchasing Agent, you advise that the Purchasing Agent will not approve the bills for payment. You posed the following question:

"Should the Comptroller pay these bills approved for payment by the Chief Justice of the Municipal Court without the approval of John Ward, Purchasing Agent?"

In considering the question, I am confronted in my research with two conflicting opinions rendered by Corporation Counsels who preceded me.

On June 7, 1932 an opinion was rendered by the then Corporation Counsel to the Mayor which involved this question:

"Your request for an opinion as to whether or not purchases made by the officers of the Municipal Court (Chief Justice, clerk and bailiff) should come through the bureau of city purchasing the same as other city purchases, or are to be made by such officers of the court themselves, was referred to the writer for attention."

The writer of the opinion, Honorable Leon Hornstein, was one of the outstanding authorities on municipal law in the country and for many years occupied the position of First Assistant Corporation Counsel. He analyzed the provisions of the Municipal Court Act and concluded as follows:

"We are therefore of the opinion that purchases for the Municipal Court may be made by the officers of the court, and that the City Council cannot compel them to make purchases through a channel of its own choosing. On the other hand, there is nothing to prevent the Chief Justice and other officers of the court from availing themselves of the facilities of the City's bureau of purchasing if they so desire to do so."

On October 10, 1947, Mr. Alexander J. Resa, a distinguished lawyer and Assistant Corporation Counsel rendered an opinion to the "Chairman, Committee of Central Purchasing" in which he held that the Municipal Purchasing Act did not apply to the Board of Election Commissioners but did apply to the Municipal Court of Chicago. As to the former, the Election Code provides that all of the *expenses of the Board are to be paid by the City of Chicago*. As to the latter section, the Municipal Court Act provides that "all blanks, books, etc. shall be furnished the officers of such court *at the expense of the City*."

The Municipal Purchasing Act, which is part of the Cities and Villages Act, Article 22 A, was adopted August 15, 1941. It has since been amended in several particulars. It provides that "*all cities of more than 500,000 population shall have the rights, powers and privileges and shall be subject to the duties and obligations conferred therein by this article.*"

Section 22 A-3 provides "all purchase orders or contracts of whatever nature, for *labor, services or work*, the purchase, lease or sale of personal property, materials * * * shall be let to the lowest responsible bidder, depending upon whether such municipality is to expend or to receive money."

Section 22 A-4 sets forth contracts that are not adapted to award the competitive bidding "such as contracts for services of individuals possessing a high degree of professional skill where the ability or fitness of the individual plays an important part."

In *People ex rel Snow v. City of Chicago* (1927) 244 Ill. App. 66, 70, held:

"The judges of the Municipal Court have by consent of the people become corporate authorities, * * * with control, so far as the law has confided it to them, of the expenses of the court and with power to incur indebtedness on the part of the City for that purpose, for which it is the duty of the City Council to provide by appropriation of money to pay it and the levy of taxes for that purpose."

(*People v. City of Chicago*, 310 Ill. 534, 538) :

"The Municipal Court Act was an independent piece of legislation and was complete in itself. * * * No amendment can take effect until it has been assented to by a majority of the legal voters of the City voting at a general or special election."

It follows that the Purchasing Act has no application to the Municipal Court of Chicago. It is clear from the provisions of the Municipal Act, as written by the legislature and as adopted by referendum, that there is to be no interference in the conduct of the business of the Court.

Under Rule 65-1 of the Rules of the Supreme Court of Illinois, the Municipal Court of Chicago is under obligation to provide court reporters to all trials where a defendant may be sentenced to imprisonment and if the defendant is without financial means, the judge shall order the reporter to transcribe his notes and deliver the transcript without charge.

Proper court reporting requires unusual skill and the Rule places a considerable burden upon the court. To properly comply with the Rule, the court should select the court reporter to take down the testimony and transcribe the notes, who is competent and upon whom the court feels justified to rely upon.

I am of the opinion that the Comptroller should honor the vouchers of the Chief Justice if they are otherwise in order.

EMERGENCY DEMOLITION CONTRACTS

(No. 12121—Purchasing Agent—E. W. P.—May 9, 1957.)

We have your letter of April 2, 1957, relating to emergency demolition of buildings particularly after a fire or where public safety is of prime concern where the jobs cost over \$10,000.00. You referred to the provision of handling emergencies of this kind under Statute up to \$10,000.00, and you wish to be advised of the accepted procedure where emergencies are involved costing more than \$10,000.00.

The first paragraph, 22A-5 of Chapter 24 of the Illinois Revised Statutes, provides that in emergencies affecting the public health and safety contracts may be let to the extent necessary to resolve such emergency without public advertisements where they are so declared by the corporate authorities of the municipality at a meeting thereof duly convened by resolution or ordinance. This paragraph refers to emergencies costing less than \$10,000.00.

There are various degrees of public emergency and should you determine that it is extreme, it would require the immediate demolition of the building in the interest of immediate public safety, regardless of the cost and without immediate Council Order, subject only to ratification by the City Council. In this event you could split the undertaking in amounts of units of \$10,000.00 indicating that your point of selection the most immediate hazardous part of the building for the first unit and extending the amounts to cover in units of \$10,000.00 or less.

We are of the opinion that you can take this course of procedure because of the exception as to emergency contracts of the general prohibition of splitting undertakings as provided for contracts other than emergency contracts in paragraph 22A-6.

EQUITABLE CONTRACT ADJUSTMENT

(No. 12237—Purchasing Agent—J. C. M.—July 2, 1958.)

In your letter of July 1, 1958, you refer to the purchase of automobiles from Courtesy Motors, under Specifications No. 22-57-120, which involved the trade-in of 91 cars belonging to the Police Department. Since there was a considerable period between the time of opening of bids, the award of the contract and the delivery of automobiles under the contract, a controversy arises as to the condition of 21 trade-in vehicles at the time of delivery of the new vehicles. Under the terms of the contract, it was contemplated that the cars to be traded in were to remain in service until the new vehicles were delivered with ordinary wear and tear expected. Some of the cars evidently were in such condition during this service period that it would have been unwise to spend money for repairing.

It is our opinion that the provision that the cars were to remain in service was for the benefit of the City so that the police work could be carried on. Certainly, if during that period any cars were wrecked or materially damaged so that it would not be economical to expend money to repair and

they presented a greater depreciation than was contemplated by the contract, the contractor is entitled to an equitable adjustment so that there is a performance as nearly as may be under the terms of the contract.

We are of the opinion that you have the right to determine the damage suffered by the contractor and compromise the claim to the best advantage possible to the City.

We return your file herewith.

METER MAINTENANCE CONTRACT

(No. 12272—*Purchasing Agent*—J. C. M.—February 13, 1959.)

We acknowledge receipt of your letter in which you request an opinion as to whether or not the City of Chicago may enter into a contract for maintenance and repair of parking meters for a period longer than one year. You also advise these services will be paid from the Chicago Parking Facility Revenue Fund.

Ordinarily, the municipality has no power to enter into contracts effective beyond a fiscal year. However, under Chapter 52.1 of the Cities and Villages Act, the Legislature intended that municipalities, having issued revenue bonds for the construction or installation of parking facilities, maintain such facilities "in good condition and maintain the same at an economical and efficient manner."

The revenue from parking meters is pledged as security of the revenue bonds and becomes part of the project. We are advised that if the City enters into a contract for the servicing of the meters for a period of three or five years, there will be a substantial saving to the City. Such action would indicate an economical operation contemplated by the statute. At the passage of the ordinance, there was an appropriation of the proceeds of the revenue bonds and the income from the garages and parking meters. We are of the opinion that Sections 7.03 (c) and 5.07 (1) of the ordinance of September 18, 1952 do not place restrictions upon your authority to enter into contracts that are beneficial to the bondholders. (*Simpson v. City of Highwood*, 372 Ill. 212).

We therefore conclude that as to maintenance and repair of existing parking meters, you may enter into a contract for more than one year if the extended period results in a saving over the costs of such work based upon one year contracts.

CHAPTER XIII — PUBLIC IMPROVEMENTS

A. AIRPORTS

LANDING FEES

(No. 11852—*Commissioner of Public Works—J. E. S.—September 16, 1954.*)

In your letter of recent date a request was made for an opinion of the contention proffered by United Air Lines, relative to the assessment of landing fees for their flight number 905 operating at Midway Airport each Saturday.

In the enclosures forwarded with your letter, the Airline seemingly adopts the position that they are not required to pay a landing fee for said flight since it was not scheduled *to operate* on the first business day of the month.

The determination of what constitutes a fee landing is generally predicated upon the current official schedule of the line on file with the Civil Aeronautics Board.

The assessment of landing fees by the City is made on a month to month breakdown of said schedule, and consequently a monthly date certain, i. e., the first business day of the month, is established from which to toll the assessable period. Flights appearing on the schedule on that date, and which will operate during the assessable period, are subject to assessment regardless of date or frequency of operation.

The stipulation contained in the United Air Lines letter dated July 16, 1954, should not be accepted as a condition precedent to payment.

It is the opinion of this office that United Air Lines is required to pay a landing fee for subject flight since, as stated heretofore, the flight did appear on their schedule on the first business day of the month.

POLICE JURISDICTION AT O'HARE FIELD

(No. 11862—*Commissioner of Police—A. F. G.—October 26, 1954.*)

On October 21, 1954 you sent to this office the following letter:

“Attached is a report from the Captain of our 33d District relative to a crime committed at O'Hare Field, Park Ridge, Illinois.

The question of jurisdiction has arisen; whether this Department should handle the investigations or a County authority should do the investigating.

You are requested to render your opinion on this point.”

The attached report from John J. Howe, Captain commanding 33rd District stated that on October 7, 1954 a complaint of larceny from an airplane was reported by Gilbert Schneider, 17 Park Avenue, River Forest, Illinois. The airplane was parked in O'Hare Field where the owner is a tenant of the City of Chicago which owns and operates the field. A Marco Transiever (omnihomer) model V.H. 3-1, serial No. 1160, valued at \$395.00 was reported stolen. The report states: "We are holding the complaint of Mr. Schneider pending decision as to whether or not the 33rd Police District is to be responsible for recording this crime and future crimes as reported from this field."

O'Hare Field is owned by the City of Chicago and we are advised that no part of the field is located in any municipality, but is wholly located in unincorporated territory. Section 23-107 of the Revised Cities and Villages Act provides as follows:

"23-107. Control of municipal property outside limits.) All property which (1) is owned by a municipality, and (2) lies outside the corporate limits of the municipality, and (3) does not lie within the corporate limits of any municipality, shall be subject to the ordinances, control, and jurisdiction of the municipality in all respects the same as the property owned by the municipality which lies within the corporate limits thereof."

In view of this provision of the law, it is our opinion that the police department of the City of Chicago has the same jurisdiction over crimes committed at O'Hare Field as it has over crimes committed anywhere within the corporate limits of the city.

OPERATION OF AIRPORTS AT A PROFIT

(No. 11965—Committee on Aviation—J. C. M.—October 13, 1955.)

At the meeting of the Committee on Aviation held on Monday, October 10, 1955, a request was made for an opinion by the Acting Corporation Counsel as to whether the O'Hare Field, Chicago International Airport, as a public utility could be operated at a profit.

Chapter 24, Paragraph 49-12 (Cities and Villages Act) Illinois Revised Statutes 1953, relating to charges and rates of municipally owned utilities, provides:

"The charges fixed for the product supplied or the service rendered by it by means of any public utility by any municipality shall be high enough to produce a revenue sufficient to bear all cost of maintenance and operation, to meet interest charges on the bonds and certificates issued on account thereof, and to permit the accumulation of a surplus or sinking fund that shall be sufficient to meet all unpaid bonds or certificates at maturity."

In *Springfield Gas Co. v. Springfield* (1920) 292 Ill. 236, at page 248 the Supreme Court held:

"Municipalities under the Municipal Ownership Act are limited in rates and charges for the product furnished by their public utilities, and cannot operate them at a profit to the same extent as can private corporations, associations or persons owning like utilities. * * *. Their charges for such services are simply to be high enough to produce revenue sufficient to bear all costs of maintenance and operation, to meet interest charges on bonds and certificates issued on account thereof, and to permit the accumulation of a surplus or sinking fund sufficient

to meet all outstanding bonds or certificates at maturity, issued on account of such utilities. The statute does not contemplate that the rates shall be higher or lower than for the purposes aforesaid, no matter what effect such rates and charges may have upon other corporations or persons owning or operating public utilities."

Courts have held airports to be public utilities (*City of Toledo v. Jenkins* (1944) 54 N. E. (2) 656; *Price v. Storms* (1942) 130 P. 2d 523). The purpose of an airport is public and governmental in nature (*People ex rel. Curren v. Wood* (1945) 391 Ill. 237, 244).

Chapter 24, Paragraph 23-96 (Cities and Villages Act) grants municipalities the right to establish and maintain public airports and grant concessions in land adjoining the landing field or any building or structure for shelter, for receiving and discharging passengers and cargo and for the accommodation of the public.

In the *City of Toledo* case cited above, there was involved the question as to what part, if any, of the municipal airport, as a public utility, was exempt from taxation. The court held that a ticket office, waiting rooms, baggage rooms, storage space, administrative offices, light control, dining rooms, facilities for repairs and furnishing of gasoline are necessary to a complete public utility airport unit. Renting space in buildings to others to promote aviation by extending service at the airport to all the public using its facilities would be a use incidental to the main public purpose.

It is the primary and principal use that controls and the fact that incidental revenue is derived from the property does not in and of itself alter the public character of the use to which the property is put. So, all the real estate necessary and incidental to the operation of a municipally owned and controlled airport unit would in its operation be concerned with a public use.

From the foregoing we are informed of the primary necessary and incidental factors that constitute a public utility airport. Applying the law of Illinois, as expressed by the statute and decisions of the courts, to those factors, it appears that the proposed ordinance relating to the agreements for the use and occupancy of O'Hare Field, Chicago International Airport, must be considered on the basis that O'Hare Field be operated on a self-sustaining basis instead of a profit making venture.

HELIPORTS

(No. 12032—Chairman, Zoning Board of Appeals—J. E. S.—April 19, 1956.)

In your letter of February 27, 1956 it was stated that the Radio Material Corporation, 3311-25 N. California Avenue, had applied to the Zoning Board of Appeals for a Special Use Permit to provide for use by helicopter of a landing dock to be located upon the roof of its building. You requested the consideration of this office in solving the various aspects of this application, i. e., as to whether the subject use would be considered a special, auxiliary or variation use.

As stated in your letter, the Chicago Zoning ordinance permits as a Special Use an airport. Doubt was expressed that the contemplated use was, in fact, a Special Use within the definition of the term "Airport".

"Airport" is defined in Section 22.6, chapter 15½, Illinois Revised Statutes, 1955, as follows:

"*Airport*" means any area of land, water or both, *except a restricted landing area*, which is designed for the landing and take-off

of aircraft, whether or not facilities are provided for the shelter, servicing or repair of aircraft, or for receiving or discharging passengers or cargo, and all appurtenant areas used or suitable for airport buildings or other airport facilities, and all appurtenant right-of-way, whether heretofore or hereafter established.

Thus, by express language, to-wit, "except a restricted landing area" and further by the interpretation of the Department of Aeronautics that a restricted landing area includes a heliport, the term "airport" is removed from application to the proposed use; and consequently such a use could not, in our opinion, be authorized as a Special Use.

An auxiliary use is defined in Section 2, Chapter 194A of the Municipal Code as "a use customarily incidental and accessory to the permitted use of a land area."

The proposed use is not, in our opinion, one customarily incidental and accessory to the permitted use of a land area. It must be conceded by all as most unique rather than customary and, consequently, the proposed use could not, again in our opinion, be considered as an auxiliary use.

Finally, Section 73-4, Chapter 24, Illinois Revised Statutes 1955, entitled "Enforcement Officers—Board of Appeals" reads, in part, as follows:

"* * * In municipalities of 500,000 or more population, the regulations authorized by this Article may be varied in their application only by the board of appeals of the municipality, subject to the power of the corporate authorities to prohibit, in whole or in part, the granting of variations in respect to the classification, regulation and restriction of the location of trades and industries and the location of buildings designed for specified industrial, business, residential and other uses. Variations shall be permitted by the board of appeals only when they are in harmony with the general purpose and intent of the regulations and only in cases where there are practical difficulties or particular hardship in the way of carrying out the strict letter of any of those regulations relating to the use, construction, or alteration of buildings or structures or the use of land. In its consideration of the standards of practical difficulties or particular hardship, the board of appeals shall require evidence that (1) the property in question cannot yield a reasonable return, if permitted to be used only under the conditions allowed by the regulations in that zone; and (2) the plight of the owner is due to unique circumstances; and (3) the variation, if granted, will not alter the essential character of the locality. A variation shall be permitted only if the evidence, in the judgment of the board of appeals, sustains each of the three conditions enumerated. The corporate authorities may provide general or specific rules implementing, but not inconsistent with, the rules herein provided to govern determinations of the board of appeals."

The pending application, not being, as stated heretofore, either a special or an auxiliary use of property as defined in Chapter 194A may only be, at this time, considered under the provisions of Section 73-4, Chapter 24, *supra*.

In view of the fact that, in our opinion, the issuance of a heliport permit by the Illinois State Department of Aeronautics does not relieve the recipient from compliance with the zoning laws, and in view of the further fact that your letter requested consideration by this office in solving the various aspects of subject application, it is suggested that the matter of helicopters and heliport generally be submitted to the City Council with a view towards amending Chapter 194A to specifically provide for their use and regulation.

O'HARE FIELD — PROCEDURE FOR ZONING

(No. 12050—Commissioner of Public Works—J. E. S.—June 25, 1956.)

In your letters of May 15 and June 4, 1956, and in Mr. Ralph H. Burke's letter of June 16, 1956, it was requested that this office advise regarding statutory procedures to be followed in zoning O'Hare Field, and that this office prepare a tentative form of zoning ordinance to be submitted to the affected political subdivision.

The right and procedure under which municipalities may zone for airports is outlined in Chapter 15½, Sections 48.1 to 48.37, Ill. Rev. Stat. 1955.

Said statute provides authority and procedure to zone airports in any of three methods:

1. Under the provisions of Section 48.17 which reads:

"Power of the Department to adopt airport zoning regulations. In each case when an airport hazard area exists in connection with an airport, until the political subdivision, or political subdivisions, acting either under Sections 13, 14 or 15, adopts, administers and enforces airport zoning regulations for such airport hazard area which the Department determines to be adequate for the purposes of this Act, the Department, on behalf of this State, may adopt, administer, and enforce, under the police power and in the manner and upon the conditions hereinafter prescribed, airport zoning regulations for such airport hazard area, which regulations may divide such area into zones, and, within such zones, specify the land uses permitted and regulate and restrict the height to which structures and trees may be erected or allowed to grow. As amended by act approved July 9, 1951."

The State Department of Aeronautics may zone.

2. Under the provisions of Section 48.13 which reads:

"Power to adopt airport zoning regulations. In order to prevent the creation or establishment of airport hazards, every political subdivision having an airport hazard area wholly or partly within its territorial limits may adopt, administer, and enforce, under the police power and in the manner and upon the conditions hereinafter prescribed, airport zoning regulations for that part of such airport hazard area which is within its territorial limits or which extends not more than two miles beyond its territorial limits.

"Every political subdivision which owns or controls an airport which is not located wholly or partly within its territorial limits may, in order to prevent the creation of airport hazards, adopt, administer, and enforce, under the police power and in the manner and upon the conditions hereinafter prescribed, airport zoning regulations for that part of such airport hazard area which extends not more than 2 miles from the boundaries of said airport and which regulations are related to the runways and facilities of such airport and shall not become effective until after such runways and facilities are installed or constructed; provided, however, that such zoning regulations shall not limit any existing use or require the reduction of the height of any existing structure without the owner's consent or the payment of just compensation for damages or loss resulting therefrom.

"Such regulations may divide such area into zones, and, within such zones, specify the land uses permitted and regulate and restrict the height to which structures and trees may be erected or allowed to grow. As amended by act approved July 9, 1951."

A political subdivision may zone.

3. Under the provisions of Section 48.14 which reads:

"Cooperation of political subdivisions; Joint airport zoning board. In each case where (a) an airport is owned, operated, controlled, leased to or leased by a political subdivision and any airport hazard area appertaining to such airport is located wholly or partly outside the territorial limits of said political subdivision, or (b) an airport hazard area is located wholly or partly within the territorial limits of two or more political subdivisions, whether or not the particular airport in connection with which such airport hazard area exists is owned, operated, controlled, leased to or leased by one or more of such political subdivisions, all the political subdivisions involved, including the political subdivision which is the owner, operator, controller, lessee or lessor of such airport, may, by ordinance or resolution duly adopted, create a joint airport zoning board, which board shall have the same power to adopt, administer and enforce airport zoning regulations applicable to the airport hazard area in question, as that vested by Section 13 in the political subdivision or political subdivisions within which such area is wholly or partly located. Each such joint board shall have as members two representatives appointed by the governing body of each political subdivision participating in its creation and in addition, another member to be chairman, elected by a majority of the members so appointed."

Affected surrounding political subdivisions may zone.

As applied solely to O'Hare Field, it would be our opinion that zoning could be accomplished under any of three methods aforesaid. Assuming that the state does not wish to zone, then each separately affected political subdivision could:

- (1) Adopt its own zoning under the provisions of the first paragraph of 48.13, although in our opinion such procedure would not be within the intent of the statute; or
- (2) Form a joint Airport Zoning Board under the provisions of 48-14 which is in our opinion within the intent of the statute.

However, a condition precedent to the adoption of any zoning procedure is the preparation of an airport approach plan under the provisions of Section 48.12 which reads:

"Preparation of airport approach plans. The Department shall formulate, adopt and revise, when necessary, an airport approach plan for each publicly-owned airport in the State. Each such plan shall indicate the circumstances in which structures and trees are or would be airport hazards, the area within which measures for the protection of the airport's aerial approaches should be taken, and what the height limits and other objectives of such measures should be. In adopting or revising any such plan, the Department shall consider, among other things, the character of the flying operations expected to be conducted at the airport, the traffic pattern and regulations affecting flying operations at the airport, the nature of the terrain, the height of existing structures and trees above the level of the airport, and the possibility of lowering or removing existing obstructions, and the Department may obtain and consider the views of the agency of the Federal Government charged with the fostering of civil aeronautics, as to the aerial approaches necessary to safe flying operations at the airport."

It is suggested, therefore, that the State Department of Aeronautics be requested to formulate an airport approach plan for O'Hare Field.

Further, in view of the fact that Section 48.16 which reads:

"Airport zoning regulations to effectuate airport approach plans. Every airport zoning regulation for an airport hazard area existing in connection with a publicly-owned airport shall be designed to effectuate the Department's airport approach plan, as amended by it, whenever necessary, for such publicly-owned airport. Upon complaint filed with the Department, including a complaint upon the Department's own motion, and after notice and opportunity to be heard, in the manner provided by "An Act relating to aeronautics and repealing a certain act herein named", enacted by the 64th General Assembly, if the Department determines that any such airport zoning regulation, in whole or in part, is substantially inconsistent with the airport approach plan of the Department, as amended by it, whenever necessary, it shall declare such airport zoning regulation to be void, in whole or as to any separable part thereof, as may be appropriate, and the whole or such separable part of such airport zoning regulation as was declared by the Department to be void shall thereafter be deemed to be void."

specifically states that zoning regulations shall be designed to effectuate the Department's airport approach plan preparation of a comprehensive zoning ordinance(s) must be held in abeyance pending receipt of said approach plan.

AIRPORT RUNWAY CONTROL

(No. 12092—Director of Airports—J. E. S.—December 12, 1956.)

In your letter of recent date, it was requested that you be advised as to whether or not you have authority to grant the Traffic Control Tower personnel the power to open and close runway 4-right/22-left, under certain conditions.

Section 37-13 of the Municipal Code of the City of Chicago reads, in part, as follows:

"Every person having occasion to use the airport facilities at any airport for any flight or aircraft operation shall observe and obey all laws pertaining to aeronautics and all rules and regulations of the federal and state authorities having jurisdiction of the subject matter of aeronautics and all rules and regulations governing the conduct and operation of said airport adopted by the commissioner of public works and the orders of the superintendent of said airport directing the time and place of landing and departure of any aircraft."

Pursuant to the provisions of said section, the superintendent of said airport may direct the time and place of landing and departure of any aircraft. The director of airports would, in our minds, as immediate supervisor be impliedly within the scope of the definition of "superintendent", and consequently would have the right to determine and delegate to the Tower personnel the power to close runway 4-right/22-left when braking action is less than normal, and aircraft are double parked at Delta, Capital and/or Braniff gates.

The basis of such closure is, without doubt, well founded in safety and as such its imposition, assuming that rules or regulations cannot be enacted to forbid double parking of aircraft, is reasonable.

It is suggested that any reference to the City of Chicago's basic airport management responsibility as outlined in the letter forwarded for our review, be deleted.

Your letter previously submitted, is returned herewith.

LICENSE — TANK FARM AT O'HARE

(No. 12116—Commissioner of Public Works—J. E. S.—April 10, 1957.)

In your letter of recent date it was requested that this office advise concerning the necessity for American Airlines to obtain a flammable liquid license for the tank farm at O'Hare Field.

With your letter was enclosed a copy of a letter addressed to you by Gardner, Carton, Douglas, Roemer & Chilgren, Attorneys-at-Law, which letter argues that such a license need not be required of American Airlines and cites reasons in support thereof.

It is our opinion that by adopting the argument propounded therein and then continuing same to the only logical end, a license for storage of flammable liquid is required of American Airlines. Without going further, the following language appearing on page two of said letter, "In support of this view (no license required) it should be noted that the reason for requiring a flammable liquid license is to enable the City to assure itself that the storage of flammable liquid is done in a proper manner and does not constitute a danger to the public."; most cogently outlines the necessity for compliance with the City Code by American Airlines.

Among the delegated police powers of the State is that granted in Section 23-75 of the Cities and Villages Act in re the regulation of storage of combustibles.

Pursuant thereto the City of Chicago did enact certain ordinances (Ch. 129 and 129.1 of the Municipal Code) wherein such regulations are outlined and a procedure for enforcement thereof established.

It is fundamental in the law that a municipal corporation cannot by contract, ordinance, or other means, surrender or curtail its legislative powers and duties, its police powers, or its administrative activity.

It is also fundamental that when municipal corporations have, by ordinance, provided for the exercise of general powers granted them by the legislature, it follows as a logical sequence that when they have so provided they must act in the manner prescribed.

The view propounded on behalf of the American Airlines prays an argument that the City could vicariously by *contra* in the absence of other legislative action, delegate to an individual the authority to determine or waive in his sole judgment enforcement of the police powers.

Such a view, in our mind is untenable and it is our opinion that American Airlines be informed that compliance with the City Code provisions is mandatory.

SIDEWALKS AT O'HARE—PUBLIC OR PRIVATE

(No. 12176—Alderman, 47th Ward—M. C. H.—November 8, 1957.)

This is to acknowledge receipt of your letter in which an opinion is requested whether or not the sidewalk adjacent to the terminal building of O'Hare Field, Chicago International Airport are "public ways of the city."

In the case of *Elmer Ricotta, Joseph Weingarten, plaintiffs, v. City of Buffalo, New York and others*, 149 N. Y. S. 2d 829:

Justice MARSH states the fact to be as follows:

"This action was commenced by the plaintiffs, respectively the operator and owner of an 'independent' taxi-cab duly licensed as such by the defendant, City of Buffalo, to obtain a Declaratory Judgment determining that the contract between the defendants, City of Buffalo, and Van Dyke Taxi and Transfer, Inc., for an exclusive taxi-cab concession at the Buffalo Municipal Airport is null and void, and that its enforcement against the plaintiffs should be enjoined. The plaintiffs' contention that the contract between the defendants City and VanDyke is illegal and unenforcible against them, as duly licensed taxi-cab operators, rests upon the following premises:

A. That the roadways and areaways of the Buffalo Municipal Airport constitute 'public' streets or highways of the defendant City, and that any contract excluding the plaintiffs from the use thereof in their taxi-cab business constitutes an invalid partial revocation and restriction of the taxi-cab licenses issued to them by the City of Buffalo.

B. That the contract between the defendant City and VanDyke was made and entered into without compliance with the statutory provisions found in section 352 of the New York General Municipal Law."

The court in this case held on page 831:

"While the public for many years has used the Airport roadways and areaways for purposes of ingress and egress, such user has not been adverse to or inconsistent with the defendant City's proprietary ownership and control of the Airport as private property, nor can such user be construed as affecting a change of private property into public streets of the defendant City. Cf. *Bolster v. Ithaca St. Ry.*, 79 App. Div. 239, 79 N. Y. S. 597; *New York Central R. R. Company v. Arthelia*, 190 Misc. 555, 564, 74 N. Y. S. 2d 507, 515; *New York Central & H. R. R. Company v. Ryan*, 71 Misc. 241, 129 N. Y. S. 55. The fact that the Municipal Airport is owned and operated by a municipal corporation rather than an individual or a business corporation does not change or affect the defendant's rights to use and control its property in the same manner as has been uniformly recognized and upheld in other corporate owners. In the opinion of this Court, the defendant City has the full right and power to take such action relating to the control and maintenance of the Airport as it may deem proper, subject to any statutory restrictions, in the same way that any other owner of property could do, and such right may not be limited or lost because the City may have heretofore allowed all taxi-cabs to operate on its property."

The court on page 832 further holds as follows:

"Conceding, therefore, for purposes of argument, that the plaintiffs' taxi-cab licenses may not be partially revoked without cause, and that

such licenses entitle the plaintiffs to pursue their business upon the public streets of the defendant City, yet such licenses do not confer any right to conduct a taxi-cab business on the private property owned by the municipal corporation, no more than on the private property of any other owner. It follows, therefore, that the contract between the defendant, City of Buffalo, and Van Dyke for an exclusive taxi-cab concession at the Municipal Airport cannot be held null and void as an unlawful infringement upon or partial revocation of the rights conferred upon the plaintiffs to do a taxi-cab business upon the public streets of the City of Buffalo. On the contrary, the contract constitutes the exercise by the defendant City of its right and power, inherent as well as statutory, to enter into contracts for the conduct of business activities at an Airport owned by it in its proprietary capacity." (Italics supplied.)

The court's dismissal of the declaratory judgment action in this case may be summed up as having held in substance that the roadways and area-ways of said Municipal Airport were not public streets or highways and that plaintiffs' license to operate taxi-cabs upon the public streets of the city did not confer any right upon them to solicit business on private property owned by the municipality and such refusal by the defendant to grant permission to solicit taxi-cab business at the airport did not constitute a partial revocation of plaintiffs' license.

The question whether or not the roadways and area-ways leading to the air terminal used by the general public as well as the persons seeking transportation facilities provided by said airport authorities, makes it a public highway, was decided in the case of *City of Chicago v. Chicago Rock Island & Pacific Railway Co., et al.*, 152 Ill. 561.

Justice SHORE delivered the opinion of the court:

"This is a bill in chancery, filed in the circuit court of Cook County, by appellees, railway companies, as complainants, to enjoin the City of Chicago, its officers, agents, etc., from interfering with complainants in the construction and maintenance of a fence along and upon certain lots in said city owned by appellees as part of their right of way, and, with the exception of narrow strips of land on either side, occupied by a passenger depot erected thereon and used by them jointly. Said lots were bounded on the north by Van Buren street, on the east by Pacific avenue, on the south by Harrison street and on the west by Sherman street. The depot building fronted on Van Buren street, and in the construction thereof said narrow strips of land were left unoccupied, and were used by the public as parts of the highways, the one on the east side, adjacent to the west line of Pacific avenue, being some twenty-seven feet wide, having been used continuously by the public, in connection with the street, since the construction of appellees' depot on said lots.

The question here involved is as to the right of ownership and control of the strips of ground mentioned, lying between appellees' depot station and the east line of Sherman street on the west, and the west line of Pacific avenue on the east."

The court in said case at page 570:

"* * * While it appears that said strips were left open in order to provide easy and free access and accommodation for vehicles carrying passengers, baggage or express matter, and therefore used in this respect by the public, as well as by general travel along the street, as part of the public highway, it does not necessarily follow, from acts of this kind, that the law will regard the land as originally intended by the owner to be dedicated to public use."

On page 571 the court also held as follows:

"* * * 'A mere non-assertion of a right does not establish the purpose or intention to denote the use to the public.' *Grube v. Nichols*, 36 Ill. 92. See, also, *Chicago v. Hill*, 124 Ill. 646; *Chicago v. Stinson*, id. 510; *Bloomington v. Cemetery Ass.*, 126 id. 221; *Chicago v. Drexel*, 141 id. 89, and cases cited."

The court in this case affirming the decree below also took into consideration that a highway may lawfully be established by public users with the acquiescence of the owners of the land over which it passes, but that rule the court said is a rule of presumption for the purpose of determining the intent of the owner of the land and was therefore inapplicable because of lack of satisfactory proofs.

See also the *City of Oakland v. Frank A. Burns and others*, 289 P. 2d 271.

The maps in the City Map Department which I examined show a vacation of all roadways leading to the airport but such examination did not disclose a dedication to the public of said roadways either formally or by implication and since the streets and sidewalks adjacent to the airport are considered private property on the theory that the use of airport roadways and areaways for the purpose of ingress and egress is considered consistent with municipalities, proprietary ownership of airports as private property for the use of persons who seek transportation facilities from the airport authorities and for those who have contractual relations with the airport authorities, the Commissioner of Public Works was within his rights to prohibit tagging on tag days authorized under section 13, chapter 36 of the Municipal Code, on said sidewalks adjacent to the airport.

B. CONSTRUCTION

COMPENSATION FOR BUSINESS DISPLACED BY URBAN RENEWAL

(No. 11982—Alderman, 5th Ward—M. I. W.—Nov. 23, 1955.)

We have your letter of November 3, in which you write upon the direction of the City Council Committee on Planning and Housing to request our opinion as to the status of the law in Illinois and the possibility of legislative changes in connection with the displacement problems of small businesses in urban renewal project areas. You specifically request our comments as to the following:

1. The payment of expenses of removal of these businesses to new locations.
2. Compensation for the difference between the fair going value and the knock down value of business fixtures and equipment.
3. The provision for a preference for displaced businesses in any comparable facilities erected under the renewal plan.

Before addressing ourselves to the specific matters you raise, some background as to the statutory basis for the programs described appears appropriate.

The term "urban renewal area" is found in the Federal Housing Act of 1949, as amended by the 81st Congress and is defined as follows:

"Urban renewal area" means a slum area or a blighted, deteriorated, or deteriorating area in the locality involved which the Administrator approves as appropriate for an urban renewal project." Section 110(a).

In paragraph (c) of section 110 the term "urban renewal project" is defined as follows:

"Urban renewal project" * * * may include undertaking and activities of a local public agency in an urban renewal area for the elimination and for the prevention of the development or spread of slums and blight and may involve slum clearance and redevelopment or rehabilitation or conservation * * *.

The type of projects contemplated by this federal legislation are developed in Chicago either by the Chicago Land Clearance Commission, created pursuant to the Blighted Areas Redevelopment Act of 1947, as amended, (chap. 67½, section 63 ff. Ill. Rev. Stat. 1955) or by the Community Conservation Board, as agent for the City of Chicago, pursuant to the Urban Community Conservation Act, as amended, (chap. 67½, section 91.8 ff., Ill. Rev. Stat. 1955).

The Blighted Areas Redevelopment Act provides in section 14 for the acquisition of real property in the following language:

"Upon approval of the determination as provided in the preceeding section the Land Clearance Commission may proceed to acquire by gift, purchase or condemnation the fee simple title to all real property lying within the area included in the redevelopment project * * * Condemnation proceedings instituted by Land Clearance Commissions shall be in all respects in accordance with an Act entitled 'An Act to provide for the exercise of the right of eminent domain,' approved April 10, 1872, as heretofore or hereafter amended."

The Community Conservation Board is given similar powers in section 6 of the Urban Community Conservation Act as follows:

"The Conservation Board of a Municipality shall have the power to acquire by purchase, condemnation, or otherwise any improved or unimproved real property the acquisition of which is necessary or appropriate for the implementation of a conservation plan for a Conservation Area as defined herein; * * *"

We move now to the consideration of the right of a businessman who owns or leases his place of business to recover the cost of removal of fixtures and equipment from the premises to be taken in accordance with an urban renewal plan. We assume the term fixtures to be used in a non-technical sense and referring to property not regarded under the law as part of the real estate. The problem of payment for fixtures at a rate reflecting their usefulness in a going business, as suggested in your second question is so closely related and so often arises simultaneously with claims for recovery of removal costs that we will consider them here together.

An examination of authorities clearly establishes the prevailing rule in most jurisdictions in this country to be that the cost of removal of equipment and fixtures held to be personal property is not allowed where the property to be taken by the public body is the real estate on which such personalty is located. 3 A. L. R. 2d 286, 4 Nichols on Eminent Domain, section 13.13 and cases cited therein.

There are two reasons generally assigned by the courts as justification for this rule. The first is that the owner's necessity of incurring removal costs does not enhance the value of the property taken and second, that such damages are speculative. *In Re Post Office Site*, 210 F. 832 (1914). Where it

is the lessee who is seeking compensation the courts have sometimes denied recovery on the grounds that the condemnation of land merely changes the date of lessee's removal and entails no damages which he would not incur in any event. Thus in *United States v. Inlotts*, 26 Fed. Case 482, Case No. 15, 441 (1873) the Court said:

"The claimants being bound by the conditions of their respective leases to remove their property at the end of their terms, the act of appropriation only changes the time when the removal should take place, but does not occasion the obligation to remove, and that, therefore, the government is not justly chargeable with the losses consequent upon removal but is only liable for the value of the right to remain or for the occupancy for the unexpired term of the lease."

And the same result has been sustained by the Supreme Court of the United States even where an alternative site was unavailable to relocate a going business, the court saying:

"There is no finding that the government took the business or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of the land." *Mitchell v. United States*, 207 U. S. 341, 69 L. Ed. 644, 45 S. Ct. 293.

Turning to Illinois authorities we find several instances where such recovery has been allowed. Thus in *St. L. V. & T. H. R. R. Co. v. Capps*, 67 Ill. 607 (1872) a railroad company was granted use of land in a public street to lay tracks, pursuant to an ordinance requiring the railroad to "pay all damages that may accrue to the property owners" along the street. An owner of property who also ran a business on the street sought to recover for the damage to his business including the loss of customers due to reduced pedestrian traffic on the street and the cost of removal of property from the premises. The court allowed the recovery pointing to the ordinance which in giving the railroad the right to use the street, imposed the condition "to pay all damages." The railroad in accepting the right, was also deemed to have accepted the condition attached thereto as part of its contract.

It should be noted that the taking of property in this case was not by a public body using public funds. Nor was the taking governed solely by the constitutional formula of just compensation for property taken or damaged, but rather by an apparently broader standard requiring payment of "all damages to owners."

In *C. M. & St. P. Ry. Co. v. Hock*, et al., 118 Ill. 587 (1886) the railroad took property by condemnation and the owner sought damages for "loss of time in preparation of said building" (partly constructed) and inconvenience and cost of removal of the business from said premises. The damages claimed were allowed the court stating that its decision was in harmony with the *Capps* case cited above. There was no discussion in the court's opinion as to whether, as in the *Capps* case which was relied on, the railroad had obligated itself to pay "all" damages that may accrue to property owners.

In *A. T. & Santa Fe Ry. v. Schneider*, 127 Ill. 144 (1889), the holder of a leasehold was forced to make way for the railroad. An instruction to the jury allowed consideration of all evidence tending to show actual value of the leasehold interest of which the defendant would be deprived including the actual loss suffered by him from the loss destruction or depreciation of the improvements placed by him on the property specially adapted to the conduct of his business; the reasonable costs of removal and of re-fitting in another location for the further conduct of the business and any injury sustained by reason of the unavoidable interruption of business incident to the removal from the site and establishing in new locations during the period of such interruption.

Distinguishing this case is the apparent *agreement of the condemnor* in the trial court as to the propriety of including these elements as bearing on damages.

In a later case, also clouded by the assent of the plaintiff at the trial level to the inclusion of removal costs in ascertaining damages, the court chose by way of a completely voluntary discussion of this problem to explore some of the difficulties of the question posed, with the following dicta:

"This court and many other have often said that the measure of damages is the market value of the property condemned * * * and this is undoubtedly the general rule; but this court has never held that the rule is without exception and that cases may not arise where a proper observance of the constitutional provision that private property shall not be taken or damaged for public use without just compensation may not require the payment of damages actually sustained other than those measured by the value of property * * *."

But may not cases arise where the cost of removal of personal property from the premises taken, and injury thereto, would exceed the value of the property taken? Let it be conceded that, as contended by appellants, the owner of a leasehold interest would have no greater right to recover such damages than the owner of the fee; might not a case arise where the owner of the fee would be entitled to such damages? Let it be supposed that the fair market value of a certain piece of real estate sought to be condemned is of itself but small value but that the property is occupied by the owner as the site of a costly manufacturing plant, is covered with valuable and complicated machinery, and that such machinery could not be removed except at an expense greater than the value of the premises; must the owner accept the value of the premises and expend the amount received and an additional sum in removing the machinery? *Metropolitan etc. R. Co. v. Siegel*, 161 Ill. 638 (1896).

The door that appeared to have thus been opened by the *Siegel* case was carefully fitted with a latch in *Braun v. Metropolitan W. S. R. R. Co.*, 166 Ill. 434 (1897) in which an award was appealed from as being inadequate, it being charged that the trial court erred in refusing to allow damages to appellant's goods, which would result from their being moved from the building and for interruptions to the business in packing, moving and re-establishing the business elsewhere. The court rejected this appeal, quoting from *Lewis on Eminent Domain*, sec. 488, as follows:

"It is a general rule that damages to personal property, or the expense of removing it from the premises, cannot be considered in estimating the compensation to be paid."

In reviewing in the *Braun* case the decisions we have cited above, the court said:

"In *Chicago, Milwaukee and St. Paul Railway Co. v. Hock*, 118 Ill. 587, the circuit court judge before whom the trial was had by agreement, without a jury, allowed the owner \$5500 for several different items of damage without stating how much was allowed for each, and among which was the 'inconvenience and cost of removal of his business from said premises.'

Upon what evidence the item was allowed, or how much was allowed for that particular item did not appear. The allowance was held not reversible error on the authority of *St. Louis Vandalia and Terre Haute Railroad Company v. Capps*, 67 Ill. 607. That was an action on this case, and the defendant was held liable under the provisions of a city ordinance, and not under the Eminent Domain law of the State. The *Hock* case does recognize the rule that loss of profits sustained by the interruption of business is not a proper element of damage. In *Atchison, Topeka and Santa Fe Railroad Co. v. Schneider*, 127 Ill. 144, the question of compensation being between the petitioner and the holders of leases on the condemned property, both parties proceeded on the theory that the tenants were entitled to receive the reasonable cost of removing and re-establishing their business, loss of business, etc., and hence the measure of compensation was not in controversy or decided."

The court having thus disposed of the *Capps*, *Schneider* and *Hock* cases then proceeded to a discussion of the *Siegel* case (*supra*) wherein it will be recalled the court had rhetorically asked whether fair market value alone would justly compensate for the damages of the property taken and drew an illustration of apparent hardship resulting from strict application of the market value test. The court interpreted the *Siegel* case as follows:

"The effect of our holding in the late * * * (*Siegel* case) * * * is, that in exceptional cases the cost of removal from the premises, interruption in business, etc., may properly be considered in estimating the fair cash value to the owner, and the allowance of such items in that case was sustained solely on the ground that the petitioner had, as in the *Schneider* case, conceded upon the trial that that might be properly considered.

"All the cases recognize the general rule as stated and it is certainly true that when the owner has been allowed the full cash market price of his property, taking into consideration the use of which he has devoted it, he has received just compensation therefor; and whenever a consideration of matters of personal inconvenience to the owner, loss of profits, damage to personal property and cost of removal is permissible, it must be when a sufficient foundation therefore has been laid, so that their consideration simply aids the jury and court in determining the fair cash value of the property in view of its present use. There is nothing in this case to bring it within any exception to the rule."

In *Cook & Rathbone Co. v. Sanitary District*, 177 Ill. 598 (1899) the court repeated the general rule as being the denial of consideration of damages to personal property or the expense of removing it from the premises while denying consideration of the difference in cost to the lessee of bringing lumber in by water as opposed to having it shipped in by rail over the next five years. The condemning authority took a strip constituting part of the leasehold along the river's edge. The court said such considerations were too remote and speculative to be allowed.

The most recent reference to the *Siegel* case in Illinois reports occurs in *City of Chicago v. Provus*, 415 Ill. 618 (1953) in which the owner of real property attempted to have included in the consideration of damages, occasioned by the taking of a part of their lake front property for an extension of the outer drive, amounts previously expended by them for an appraisal fee in connection with a proposed FHA loan, loss occasioned by inability to use architects' plans for a proposed apartment building and a claim for a mortgage service charge. The court adopted the pure market value test and refused to consider the outlay of capital for future use planning and financing on the grounds that the value of the vacant land was not thereby enhanced. The appellant cited the *Siegel* case but the Supreme Court seemingly put an end to any notions that the dicta in the *Siegel* case, quoted above, is to be given serious future consideration. The *Siegel* case was casually dismissed by reference to the *Braun* case in which, as already indicated, the court pointed out that the petitioner had conceded, at the trial level, that damages for cost of removal and loss of profits were allowable.

Thus, although earlier cases indicated the possibility that some relief for business losses might be forthcoming in Illinois, in contradistinction to the general rule followed in most other jurisdictions, later cases seem to bring our state in line with the prevailing view.

The picture is not yet entirely clear, and some questions remain to be answered. In the *Braun* case, the court used language in an apparent effort to clarify the *Siegel* case, in which it was said the fair "market value" test may not be applicable in all cases. The court suggests the *Siegel* case language really means "the fair cash value to the owner", which in turn it is suggested is synonymous with "the fair cash value of the property in its present use." Such valuation it is suggested may, in an exceptional case, be arrived at by consideration of matters of inconvenience to the owner, such as removal costs

Whether the kinds of exceptions contemplated are those that normally fall outside the general market value rule, such as railroad property, schools, churches, etc. (*Sanitary District v. Pittsburgh, Ft. Wayne and Chicago Railway Co.*, 210 Ill. 575), or constitute another, yet undefined class of cases, does not appear in the reports. (Compare, for example, *Forest Preserve District v. Hahn*, 341 Ill. 591 (1931) and *Pittsburgh C. C. & St. L. Ry. Co. v. Gage*, 286 Ill. 213 (1919) where the court held the test to be market value rather than the value to the owner.)

It, therefore, appears that in spite of early litigation into which could be read a willingness on the part of the Illinois court to adopt a more liberal view in such matters, the court has occasionally denied recoveries of the type under discussion and has yet to allow such damages in a clear cut case. Certainly a lessee, under a short term lease, typical of the situation we are now considering, is still apparently without a remedy since he has no property other than the unexpired leasehold, which is being taken for public purposes.

Thus, in *City of Chicago v. Cunnea*, 329 Ill. 288 (1928), the City's witnesses testified that the market value of the property taken was \$6,000.00. The owners apparently did not contradict this testimony but argued that compensation should be based on the cost of securing other equally suitable premises and sought to prove that such equally suitable property could not be secured for less than \$12,000.00. The trial judge at first permitted this evidence to be introduced but subsequently directed that it be stricken. Counsel for the owners, in the argument to the jury, contended that the award "must be enough money so that you can get the same kind of home you had before," and made other similar statements which the Supreme Court regarded as so *prejudicial* as to require a reversal in spite of the fact that both the testimony and the argument had been stricken and *although the court said that the verdict was not excessive*.

We come next to a consideration of whether it would be possible to provide for compensation as for cost of removal and related matters by legislation.

Courts have often hinted at the appropriateness of some legislative modification of what sometimes appears as a harsh rule under bare constitutional requirements. Thus, in *Oakland v. Pacific Coast Lumber etc., Co.*, 171 Cal. 392, 153 P. 705 (1915), the court said:

"We are not to be understood as saying that this should not be the law when we do say that it is not our law. It is quite within the power of the legislature to declare that a damage to that form of property known as business or good will of a business shall be compensated for, but unless the constitution or the legislature has so declared, it is the universal rule of construction that an injury or inconvenience to a business is *damnum absque injuria* and does not form an element of the compensating damages to be awarded."

Statutes of this character have occasionally been passed in the United States. One of the earliest of these efforts to grant compensation beyond what was constitutionally required was a Massachusetts statute known as the Metropolitan Water Supply Act, designed to enable the City of Boston to secure a municipal water supply. The Act provided that an owner of an established business, whether "taken or not" might recover compensation for a resulting decrease in the value of the business. In holding that the professional practice of a physician was an established business within the meaning of the Act and in determining the decrease in value of such a business, the court refused to accept "market value" as the standard of value, saying that damages were to be paid for.

"* * * the actual decrease in value of that business, not for the decrease in value of such elements in it, only, as admitted of being sold.

There is no practical difficulty in the way of carrying out the statute according to its meaning. The money value of the petitioner's business could be estimated, even though absolutely personal to himself." *Earle v. Commonwealth*, 180 Mass. 579, 584, 63 N. E. 10, (1902).

The obvious question posed by special statutory enactments is whether the provision for payment of compensation beyond what is constitutionally required constitutes an appropriation for non-public purposes and is thus objectionable. In Illinois, as is generally held, the constitutional provisions prohibiting taking or damaging without compensation have been held to be self executing and not requiring legislation and not subject to any impairment by legislation or ordinance. *Feldman v. City of Chicago*, 363 Ill. 247 (1936) reversing 276 Ill. App. 142; *People ex rel. John Farwell v. Kelly*, 361 Ill. 54 (1935). If the constitutional guarantee cannot be subtracted from by the legislature, can it be added to? Obviously the mere fact that a governmental authority pays money into private hands does not necessarily constitute such payment as a donation for private purposes. The illustrations of everyday experience are all that are necessary as citations of authority that payment for the benefit of private persons may nevertheless be for a public purpose. There are other tests as to whether such payments are proper uses of public funds.

Such an attack was made on a Rhode Island statute which authorized the City of Providence to condemn land for water supply purposes and provided compensation for various types of incidental losses, such as removal costs and injuries to business. The contention was made that in extending compensation beyond the scope of constitutionally guaranteed payment, the statute deprived taxpayers of their property without due process. The Supreme Court of the United States said there was no rule standing in the way of such an extension of compensation. *Joslin Manufacturing Company v. Providence*, 262 U. S. 668, 677, 43 S. Ct. 684, 67 L. Ed. 1167 (1923). The court quoted from an earlier Massachusetts opinion of Mr. Justice Holmes:

"Very likely the rights were of a kind that might have been damaged if not destroyed, without the constitutional necessity of compensation. But some latitude is allowed to the legislature. It is not forbidden to be just in some cases where it is not required to be by the letter of paramount law." *Earle v. Commonwealth*, *supra*.

Obviously any such proposed legislation would have to meet the customary tests of reasonableness and be free from arbitrary class discriminations. Whether, for example, the provision of such payments for businessmen in urban renewal areas would be objectionable if like claims or other classes of persons displaced by the same or other public programs were not similarly recognized is a matter beyond the scope of the present opinion.

We have likewise refrained from expressing the opinion of this office as to the desirability of such a legislative extension of the duty of public bodies to compensate.

The principal reason which can be assigned to the shying away by the courts from permitting recovery of such compensation, that is the speculative and uncertain character of the amount of damages, should not be attributed to the laziness of judges hesitant to address themselves to the solution of complex formulae. The problems met in dealing out such payments in a fair and certain manner are serious and substantial. And whether these problems will be handled by the courts in the final analysis or by administrators of programs in the first instance, the establishment of a precise formula by the legislative looms as a momentous task.

It is not only the problem of distributing with justice that have given the courts pause when they have been tempted to relieve cases of demonstrated hardship. Of no less public concern is the need for officials assigned the responsibility of developing public improvement programs, to be able to

at least approximate what is involved by way of cost to finance the gigantic undertaking characterizing this present period of monumental public works. The reliability of such estimates become even more important in an era of revenue bond financing. What the impact of present adoption of such additions to local cost would be on existing programs for which bonds have already been sold is likewise deserving of most serious consideration.

The propriety of the use of bond issue funds which have heretofore been approved by the voters for this extension of payments beyond the constitutional and statutory requirements at the time of approval is not considered in this opinion.

The third question you raise is with regard to the establishment of priorities for displaced commercial tenants in appropriate facilities which may be erected under the renewal plan. It seems clear upon cursory examination that the legislature could accomplish this purpose. Though we should not wish so to state conclusively at this time, it may well be possible to achieve this result insofar as Illinois law is concerned without seeking action by the General Assembly.

We trust this response to your inquiry proves helpful for your present purposes and stand ready to give consideration to any further inquiry you may submit.

RIGHT-OF-WAY ACQUISITION FORM

(No. 12056—Chief Engineer, Bureau of Engineering—C. P. B.—July 20, 1956.)

We are in receipt of your letter of July 9, 1956, and the attached letters relating to contents of warranty deeds involving right-of-way acquisitions by MFT funds.

In your letter you ask if we are to follow the suggestion of William M. Dutelle of the State of Illinois, Bureau of Local Streets and Roads advising that where property is acquired with MFT funds, the deeds are to specify "for public highway purposes" or similar language, as per Mr. Dutelle's letter of June 29, 1956, a copy of which said letter was transmitted to us in your communication of July 9, 1956. You also ask what disposition should be made of small segments, acquired but not used for road purposes.

As per your request, we have examined relevant statutes and cases and advise you as follows:

There is no constitutional restriction as to the extent of the interest that may be taken in acquiring property for public purposes. But where the enabling statute does not expressly grant authority to acquire a fee simple absolute, then a determinable fee, easement or lesser estate, necessary to effectuate the public improvement is all that may be acquired. *City of Waukegan v. Stanczak*, 6 Ill. 2nd 594 (1955); *Sanitary District of Chicago v. Manasse*, 380 Ill. 27 (1942).

Since acquisitions of lands for highway purposes by the use of MFT funds are restricted in that the enabling statutes do not specifically authorize acquisitions of fee simple titles the acquiring body may only acquire such interest as is necessary to effect its highway purpose. Therefore, it is not necessary that deeds acquiring properties to be devoted to highway use recite "convey and warrant to the County of for the use of the people of the State of Illinois, for the purpose of a right-of-way for a public highway",

or "grant, convey and dedicate to the people of the State of Illinois for the purpose of a public highway", as suggested by Mr. William M. Dutelle of the Bureau of Local Roads and Streets in his letter of June 29, 1956. Such language can neither add nor detract from the limitations imposed by statute. The suggested language would prove to be of value, however, in completing public records, since County records should show the limitations of the acquisition.

With reference to the question of disposal of small segments of property acquired for road, street or highway purposes, but not used for such purposes we suggest that those properties may continue to be held for future road, highway or street use. An abandonment of such use does not occur by operation of law but upon petition to the Court, and the Court must be shown an intention to abandon before there can be a judicial declaration of abandonment. Upon abandonment of the use for which the property was acquired, title reverts to the original owner.

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